IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-179

ROBERT L. JOHNSON, JR., *et al.*,
Petitioners,

v.

RYDER TRUCK LINES, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioners, Robert L. Johnson, Jr., et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 2, 1978.

Opinions Below

The May 2, 1978 opinion of the court of appeals is reported at 575 F.2d 471, and is set out in the Appendix hereto, pp. 1a-12a. The April 1, 1977 opinion of the court of appeals is reported at 555 F.2d 1181, and is set out in the Appendix hereto, pp. 13a-14a. The remedial decree entered by the district court on January 15, 1976, which is not officially reported, is reprinted in 10 EPD ¶ 10,692, and is set out in the Appendix hereto, pp. 15a-25a. The opinion of the district court, dated November 18, 1975, which is not officially reported, is reprinted in 10 EPD ¶ 10,535, and is set out in the Appendix hereto, pp. 26a-71a.

Jurisdiction

The judgment of the court of appeals was entered on May 2, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does a seniority system which perpetuates the effect of past intentional racial discrimination in employment violate 42 U.S.C. § 1981?

2. Where an employer, acting in violation of 42 U.S.C. § 1981, intentionally assigns or restricts a black employee to a particular job because of his race, does the employer remain in violation of § 1981 until it removes obstacles, such as seniority rules, which lock that employee into the job to which he was assigned or restricted because of his race?

3. Where an employer, acting in violation of 42 U.S.C. § 1981, intentionally assigns or restricts a black employee to a particular job because of his race, should the statute of limitations be tolled under 42 U.S.C. § 1988 until the employer removes obstacles, such as seniority rules, which lock that employee into the job to which he was assigned or restricted because of his race?[1]

[1] In Fourteenth Amendment litigation regarding the perpetuation of past discrimination, this Court has articulated in different ways the underlying violation. In *Swann* v. *Charlotte-Mecklenburg Board of Ed.*, 402 U.S. 1 (1971), the defendant was described as remaining in violation so long as discriminatory effects continued; *North Carolina Board of Ed.* v. *Swann*, 402 U.S. 43 (1971), held that practices which perpetuated past discrimination were themselves violative of the Constitution. The three questions *supra* are intended to parallel the various ways of describing the violation in the *Swann* cases; these may be only three ways of describing the same type of violation, but we include them all to avoid any dispute as to the scope of the question presented. In the interests of brevity we use the first formulation in the body of the petition.

Statutory Provisions Involved

Section 1981, 42 U.S.C., provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 703(h) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(h), provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system.

Statement of the Case

Plaintiffs commenced this action on January 5, 1973, against Ryder Truck Lines, the International Brotherhood of Teamsters, and its Local 71, alleging that they had engaged in racial discrimination in employment in violation of 42 U.S.C. § 1981 and of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The complaint sought injunctive relief including back pay and an award

of constructive seniority. The case was certified as a class action, and was tried in August of 1975.

On November 18, 1975, the district court found, *inter alia*, that the company had a consistent policy of refusing to hire as longline drivers any blacks, whether from among its own employees in other positions or from among the pool of non-employees applying for work. App. 33a-35a. Ryder had no black longline drivers as of July, 1965, and none of the 63 longline drivers hired from 1966 to 1971 were black. App. 30a-31a. As of the date when the suit was filed, the seniority system established pursuant to the contract between the company and the unions forbade employees transferring to longline jobs to carry over their seniority, thus effectively locking them into the jobs to which they had been assigned on the basis of race. App. 35a, 37a. The district court held that "the collective bargaining agreements in effect at the time of the filing of this action perpetuated into the present the effects of past discriminatory hiring to the detriment of plaintiffs," and ruled that "the restrictive seniority provisions in the pertinent agreements were violative of Title VII and 42 U.S.C. § 1981." App. 36a.

The district court noted that in 1973, two years after the commencement of this action, the defendants had modified their seniority rules to permit employees to transfer to longline jobs without a loss of seniority; because the court held that the pre-1973 seniority system was unlawful, it ordered the defendants to retain in effect this new provision for carryover seniority. App. 19a, 37a. The company was directed to offer longline jobs to specified blacks who had earlier been denied those jobs because of their race, together with appropriate constructive seniority dates. The trial court also awarded back pay to blacks who had been the victims of the proven demonstration,

which awards included losses sustained when those black employees were locked out of longline jobs by the provisions of the pre-1973 seniority system.

On appeal the Fourth Circuit first affirmed the district court in a per curiam opinion dated April 1, 1977. App. 13a. Subsequently the court of appeals granted rehearing to consider the effect of *Teamsters* v. *United States*, 431 U.S. 324 (1977). The court of appeals on rehearing concluded that *Teamsters* required reversal of the decision of the district court insofar as that court had held the pre-1973 seniority system violated Title VII because it perpetuated past discrimination. The court of appeals also considered at greater length the district court's decision that the seniority system violated § 1981. Two members of the court concluded that, although such a seniority system would have violated § 1981 prior to the *Teamsters* decision, the limitation of § 703(h) of Title VII, as construed by *Teamsters*, must be applied to § 1981. The third judge also held, for somewhat different reasons, that a seniority system which perpetuates the effect of past discrimination does not violate § 1981.

Reasons for Granting the Writ

This case presents under § 1981 a challenge to the same practice whose legality under Title VII was decided in *Teamsters* v. *United States*, 431 U.S. 324 (1977)—using a seniority system to lock black employees into jobs to which they were assigned on the basis of race. In *Teamsters* this Court recognized that the question of whether that practice is lawful was so "significant" as to warrant a grant of certiorari, 431 U.S. at 334; the legality of that practice under § 1981 is of the same practical import as its legality under Title VII, the issue decided in *Teamsters*. A sub-

stantial proportion of all black industrial workers over 35 were assigned prior to 1965 to lower paying jobs because of their race and are subject to departmental seniority systems; the applicability of § 1981 to such systems will determine whether those hundreds of thousands of blacks will for the rest of their careers be paid less than younger and less experienced whites.[2] The availability of relief under § 1981 is of equal importance to large numbers of minority employees who were assigned to jobs after 1965 because of their race but who did not immediately after those assignments file charges with the EEOC.[3]

Prior to this Court's decision in *Teamsters* the Fourth Circuit had held that employment practices which perpetuate the effect of past intentional discrimination violate § 1981.[4] Accordingly the district court in this action held that the seniority system, which perpetuated past intentional discrimination by locking plaintiffs into jobs to which they had been assigned because of their race, was unlawful under § 1981. App. 36a, 69a. The Fourth Circuit initially affirmed this decision. App. 13a. After

[2] Five of the petitioners were hired prior to the effective date of Title VII. All would be entitled to the monetary and injunctive relief awarded by the district court if petitioners' § 1981 claims were sustained. To what extent these five petitioners would be entitled to relief under Title VII, based on continued intentional discrimination after 1965, presents issues of law and fact which the court of appeals remanded to the district court.

[3] Whether such an employer would remain in violation of Title VII so long as it locked minority employees into such jobs appears to have been left unresolved by *United Air Lines* v. *Evans*, 431 U.S. 553, 558, n.10 (1977).

[4] *Williams* v. *Norfolk & Western R.R.*, 530 F.2d 339, 442 (4th Cir. 1975). The continuous violation referred to in *Williams* was a nepotistic hiring system to fill jobs in an all white railroad yard. See *Rock* v. *Norfolk & Western R.R.*, 473 F.2d 1344 (4th Cir. 1973). In *Teamsters* this Court noted that such nepotism was like a seniority system in that it "perpetuates the effects of prior discrimination". 431 U.S. at 349, n.32.

Teamsters, however, it reversed the finding of a violation of § 1981 on the theory that the limitations of § 703(h) of Title VII must be applied to § 1981 as well. Notwithstanding *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), which held that § 1981 and Title VII were independent statutes, the court of appeals reasoned:

> *Johnson* emphasized that a party proceeding under § 1981 is not restricted by the administrative and procedural requirements of Title VII, but nothing in *Johnson* suggests that a practice lawful under Title VII can be held unlawful under § 1981. On the contrary, *Johnson* recognizes that Congress noted that Title VII and § 1981 are "co-extensive" and that they "augment each other and are not mutually exclusive." 421 U.S. at 459. *Johnson* gives no indication, however, that Congress intended to create conflicting and contradictory standards for determining what constitutes illegal discrimination. App. 6a-7a.

The Fourth Circuit concluded that § 1981 must be construed to permit any employment practice which is legal under Title VII.

This conclusion is squarely inconsistent with repeated decisions of this Court that the provisions of § 1981 are entirely independent of, and were in no manner restricted by, the adoption of Title VII. The Court expressly held in *Johnson* that "Section 1981 is not coextensive in its coverage with Title VII," 421 U.S. at 460, and that Title VII and § 1981 "although related, and although directed to most of the same ends, are separate, distinct and independent." 421 U.S. at 454. See also *Runyon* v. *McCrary*, 427 U.S. 160, 174-175 (1976). Both in 1964 and in 1972 Congress rejected proposals to make Title VII the exclusive prohibi-

tion against employment discrimination.[5] In 1972 opponents of that proposal expressly referred to the 1866 Civil Rights Act and argued it was needed since "employees are not fully protected" by Title VII because of the limitations written into Title VII to assure its passage.[6] In 1964 the same Justice Department memorandum relied on by this Court in *Teamsters*, and placed in the Congressional Record by Senator Clark, stated "[T]itle VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State Statutes".[7] Section 703(h), on which the court of appeals relied, begins "Notwithstanding any other provision *of this subchapter*, it shall not be an unlawful employment practice . . ." (emphasis added); Congress could not have made it more clear that it did not intend the limitations of § 703(h) to apply to any civil rights statutes other than Title VII.

Whether § 1981 prohibits seniority systems that perpetuate past intentional discrimination, or has in this regard been repealed by the adoption of § 703(h), is a question on which the circuits are divided. In addition to the Fourth Circuit in the instant case, the Second Circuit has held that § 703(h) constitutes such a "repeal by implication" since "Congress has clearly placed its stamp of approval upon seniority systems."[8] The Third Circuit, on the other hand, rejected this construction of § 703(h),

[5] See 110 Cong. Rec. 13650-52 (1964); 118 Cong. Rec. 3372-73, 3964-65 (1972); *Runyon* v. *McCrary*, 427 U.S. at 174-75; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48, n.9 (1974).

[6] 118 Cong. Rec. 3372 (Sen. Williams), 3962 (Sen. Javits) (1972).

[7] 110 Cong. Rec. 7207 (1964); *Teamsters* v. *United States*, 431 U.S. at 352.

[8] *Chance* v. *Board of Examiners*, 534 F.2d 993, 998 (2d Cir. 1976).

holding that, despite *Teamsters*, Congress in adopting Title VII did not intend "to circumscribe the remedial powers of the federal courts under §§ 1981, 1983, 1985 and 1988,"[9] and the Sixth Circuit has held that § 1981 forbids the use of a seniority system giving preference in promotions to senior employees where whites enjoyed greater seniority because of past intentional discrimination.[10] The Seventh and Ninth Circuits have held that the substantive scope of § 1981 and Title VII are the same, without elaboration regarding to what extent this occurred because Title VII implicitly repealed or expanded § 1981 to produce that congruence.[11] The status of this issue in the Fifth Circuit is unclear despite several relevant opinions.[12] Judge Winter, concurring in the decision in the instant case, noted the existence of this conflict.[13]

[9] *Bolden* v. *Pennsylvania State Police*, 16 EPD ¶ 8,306 (3rd Cir. 1978).

[10] *Afro American Patrolmens League* v. *Duck*, 503 F.2d 294, 301 (6th Cir. 1974). See also *Long* v. *Ford Motor Co.*, 496 F.2d 500, 505 (6th Cir. 1974).

[11] *Davis* v. *County of Los Angeles*, 566 F.2d 1334, 1340 (9th Cir. 1977), *cert. granted* —— U.S. —— (1978); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1320, n.4 (7th Cir. 1974), *cert. den.* 425 U.S. 997 (1976).

[12] In *Watkins* v. *United Steel Workers*, 516 F.2d 41 (5th Cir. 1975), the Fifth Circuit rejected a § 1981 challenge to a seniority system. This appears to have been because under the facts of that case the system did *not* perpetuate past discrimination; the court suggested that § 1981 and Title VII were the same, but this was before *Teamsters* and at that time under Fifth Circuit law a seniority system which perpetuated past discrimination violated Title VII. See 516 F.2d at 51-52. In *United States* v. *East Texas Motor Freight*, 564 F.2d 179 (5th Cir. 1977) the Fifth Circuit held that § 703(h) nullified Executive Order 11246, insofar as the Order prohibited seniority systems perpetuating past discrimination, but did not squarely address the status of § 1981.

[13] Among the courts finding no cause of action under § 1981 for seniority systems perpetuating past discrimination, there is a further conflict as to whether § 1981 never prohibited such systems or whether it was repealed in this respect by § 703(h). Judge Winter adopted the former line of reasoning, and expressly disapproved the implied repeal rationale of *Chance*. App. 9a, n.2.

A related conflict exists among the lower courts as to whether § 1981 was repealed *pro tanto* by the private club exemption to Title II of the 1964 Civil Rights Act,[14] 42 U.S.C. § 2000a(e).

The opinion of the court of appeals suggests, despite its earlier decision in *Williams*, that an employment practice which perpetuates the effect of past intentional discrimination is nonetheless legal under § 1981 if it is neutral on its face. App. 4a. The substantive prohibitions of § 1981, however, are at least as broad as the Fourteenth Amendment. See *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948). This Court has repeatedly held that neutral state practices which perpetuate the effects of past intentional discrimination are themselves unlawful. A school board which earlier assigned students on the basis of race remains in violation of the Constitution if it adopts a policy of reassigning students each year to the school they attended previously, subject only to a transfer procedure whose burdens are so great as to lock students into their original school. *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968). A geographic assignment plan that "appears to be neutral" is unlawful if it maintains in operation "the continuing effects of past school segregation." *Swann* v. *Charlotte-Mecklenburg Board of Ed.*, 402 U.S. 1, 28 (1971). So long as a past act of intentional discrimination caused the present assignment of a worker or student, the "remoteness in time" of the past

[14] This Court noted but did not reach that issue in *Runyon* v. *McCrary*, 427 U.S. 160, 172, n.10 (1976) and *Tillman* v. *Wheaton-Haven Recreation Asso.*, 410 U.S. 431, 438-39 (1973). The lower courts in those cases had divided on this issue. *Tillman* v. *Wheaton-Haven Recreation Asso.*, 451 F.2d 1221, 1214, 1225 (4th Cir. 1971) (repeal by implication); *Gonzales* v. *Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200, 1205 (E.D. Va. 1973) (no repeal by implication).

intentional conduct is irrelevant to the legality of present practices which perpetuate its impact. *Keyes* v. *School District No. 1*, 413 U.S. 189, 210-211 (1973). A state which in an earlier period refused to permit blacks to register to vote cannot thereafter adopt a "neutral" policy of prohibiting registration now by persons who failed to register during that earlier time. *Lane* v. *Wilson*, 307 U.S. 265 (1939). A state cannot, even pursuant to a neutral policy based in common law of enforcing all real property covenants, enforce a racially restrictive covenant executed 40 years earlier. *Shelley* v. *Kramer*, 334 U.S. 1, 20-22 (1948); see also *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 178-79 (1972). So long as a state practice perpetuates the effect of past discrimination the state is in violation of the Constitution, regardless of whether that practice was adopted in good faith. A seniority system which locks black state employees into jobs to which they had been assigned on the basis of race would be no more lawful under the Fourteenth Amendment than the discredited grandfather clauses and pupil placement plans of earlier eras. If, as *Hurd* indicates, § 1981 prohibits private employers from taking the action forbidden to public employers by the Fourteenth Amendment, the decision below is inconsistent with half a century of constitutional decisions by this Court.

This Court has granted certiorari in *County of Los Angeles* v. *Davis*, No. 77-1553, which presents an issue closely related to that in the instant case: whether § 1981 prohibits the use of non-job related employment tests with a discriminatory impact even where there was no present or past intentional discrimination. If, as the Ninth Circuit held in *County of Los Angeles*, § 1981 prohibits the same employment practices forbidden under Title VII by *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), then

§ 1981 would also forbid the use of seniority systems with a discriminatory impact; *Teamsters* recognized that such seniority systems "fall under the *Griggs* rationale", 431 U.S. at 349-50, and held them lawful under Title VII solely because of the exception in § 703(h). It appears, however, that neither possible disposition of *County of Los Angeles* would definitively resolve the issue in this case. If the Court holds in *County of Los Angeles* that § 1981 contains a general prohibition against practices with a discriminatory effect, the question will remain as to whether, as several circuits have held, § 1981 was partially repealed by § 703(h). Conversely, should the Court there hold that § 1981 contains no such general bar, that would not resolve the legality under § 1981 of a practice, such as a seniority system, which perpetuated past intentional discrimination. The difference between a practice which merely falls more heavily on blacks, and a practice which perpetuates the effect of past intentional discrimination, is the difference between *Washington* v. *Davis*, 476 U.S. 229 (1976) and *Green* v. *School Bd. of New Kent County*, 391 U.S. 430 (1968). We would therefore suggest, rather than hearing these two cases in successive Terms, that certiorari be granted now in the instant case and that it be set for argument with *County of Los Angeles*.

CONCLUSION

For the above reasons a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

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APPENDIX

Opinion of Court of Appeals—May 2, 1978

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1293

JOHNSON v. RYDER TRUCK LINES

May 2, 1978

Before:

WINTER, BUTZNER, and RUSSELL,

Circuit Judges.

BUTZNER, *Circuit Judge:*

After affirming the district court's grant of injunctive relief, retroactive seniority, and back pay in this class action brought under Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.] and § 16 of the Civil Rights Act of 1870 [42 U.S.C. § 1981], we granted rehearing to consider the effect of International Brotherhood of Teamsters v. United States, 431 U.S. 324, 14 FEP Cases 1514 (1977).[1] The principal question to emerge on rehearing is whether some employees can obtain relief under § 1981 that is not available to them under Title VII. We hold that in this instance they cannot, and we modify our initial opinion and remand the case for further proceedings.

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[1] Our initial decision is reported as Johnson v. Ryder Truck Lines, Inc., 555 F.2d 1181, 17 FEP Cases 570 (4th Cir. 1977).

I

Incumbent black employees who were discriminated against when hired before the effective date of Title VII in 1965 were subsequently prevented by the company's bargaining agreement from obtaining jobs as line drivers while maintaining their full company seniority. The district court's order provided relief to employees who suffered in this way from the present effects of pre-Act discrimination. Rehearing disclosed that the relevant provisions of the bargaining contract involved in this case and the one considered in Teamsters are virtually identical. Both contracts provided that employees could not carry their full company seniority for all purposes with them when they transferred to line driver positions.

In Teamsters the Court considered the effects of § 703(h) of the 1964 Act [42 U.S.C. § 2000e-2(h)] on the contract's seniority system.[2] It said:

> [W]e hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees. 431 U.S. at 353-54, 14 FEP Cases at 1526.

[2] Section 703(h) of the 1964 Act [42 U.S.C. § 2000e-2(h)] provides in part:

Notwithstanding any other provision of this subchapter, it shall not be unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . . provided that such differences are not the result of an intention to discriminate because of race . . . .

Therefore, Teamsters invalidates our affirmance of the district court's conclusion that the company's seniority system violated Title VII.

The employees assert, however, that § 703(h) is expressly limited to Title VII and that it should not be construed as a restriction on § 1981. They therefore insist that the seniority system violates their rights secured by § 1981 and that they are entitled to relief under that statute. It is this issue that we now address.

II

Title 42 U.S.C. § 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The Civil Rights Act of 1964 did not repeal by implication any part of § 1981. This is firmly established by both the legislative history of the 1964 Act and its 1972 amendments. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 457-61, 10 FEP Cases 817, 819-820 (1975); cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 416 n.20 (1968). Section 1981 affords a federal remedy against racial discrimination in private employment that is "separate, distinct, and independent" from the remedies available under Title VII of the 1964 Act. Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 461, 10 FEP Cases at 820. Thus an employee "who establishes a cause of action under § 1981

is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages." 421 U.S. at 460, 10 FEP Cases at 819.

This case therefore presents the question of whether the incumbent employees who were discriminatorily hired before 1965 when Title VII became effective have a cause of action under § 1981 because the bargaining contract's restriction of carryover seniority perpetuates the pre-1965 hiring discrimination.[3] Of course, each pre-1965 incumbent black employee had a cause of action under § 1981 because of the company's discriminatory hiring practices. But all parties recognize that this cause of action is barred by North Carolina's three-year statute of limitations, N.C. Gen. Stat. § 1-52(1), which is made applicable to the § 1981 claim. Johnson v. Railway Express Agency, Inc., supra, 421 U.S. at 462, 10 FEP Cases at 820.

The seniority provision of the bargaining contract was facially neutral, applying to both white and black employees if they transferred to the higher paying position of a line driver. Both black and white employees were subject to loss of their former departmental seniority and had to start at the bottom of the seniority list for line drivers even though they may have had more employment seniority than line drivers higher on the ladder. Consequently, § 1981 does not afford the black employees relief, because this statute confers on black persons only the same rights possessed by white persons.

[3] Applicants refused jobs after 1965 on account of their race are entitled to an award of seniority retroactive to the date of application. Franks v. Bowman Transportation Co., 424 U.S. 747, 762-70, 12 FEP Cases 549, 555, 557 (1976). Theoretically, the same measure of retroactive seniority would be available to pre-1965 incumbents who sought linehaul jobs, but it would be of less value to them because they could not carry over their full employment seniority to their new job assignment.

Moreover, the application of 42 U.S.C. § 1988 does not lead to a different conclusion. Section 1988 directs federal courts to enforce § 1981 "in conformity with the laws of the United States, so far as such laws are suitable . . ."[4] Section 1988 in itself does not create any cause of action, but it "instructs federal courts as to what law to apply in causes of action arising under federal civil rights acts." Moor v. County of Alameda, 411 U.S. 693, 703-06 (1973); Scott v. Vandiver, 476 F.2d 238, 242 (4th Cir. 1973).

In Griggs v. Duke Power Co., 401 U.S. 424, 430, 3 FEP Cases 175, 177 (1971), the Court held: "Under the [1964] Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of piror discriminatory practices." This concept is essential to the employees' suit. However, in Teamsters v. United States, supra, 431 U.S. at 349, 14 FEP Cases at 1525, the Court held that the Griggs rationale is not applicable to a seniority system that is lawful under § 703(h). Ordinarily, § 1988 enables a district court to utilize Griggs's interpretation of Title VII in a § 1981 employment discrimination suit, but the court cannot transgress the limitation placed on the Griggs rationale in Teamsters with respect to § 703 (h). A ruling that a seniority system which is lawful under Title VII is nevertheless unlawful under § 1981 would disregard the precepts of § 1988. An analogous situation concerning the application of § 1988 is presented by Moor v.

[4] Title 42 U.S.C. § 1988 provides in part:

The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect . . . .

County of Alameda, 411 U.S. 693 (1973), dealing with the enforcement of a § 1983 claim by utilization of a state law which made municipalities vicariously liable for the acts of their employees.[5] The Court held that such a state law could not be utilized to enforce the rights secured by § 1983 because it was inconsistent with federal law that excludes municipal corporations from liability under § 1983. 411 U.S. at 706.

Our conclusion accords with decisions that have held, although in different context, that § 1981 does not invalidate bona fide seniority provisions. See, e.g., Chance v. Board of Examiners, 534 F.2d 993, 998, 11 FEP Cases 1450, 1454 (2d Cir. 1976); Watkins v. United Steel Workers Local 2369, 516 F.2d 41, 49-50, 10 FEP Cases 1297, 1304 (5th Cir. 1975); Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1320 n.4, 8 FEP Cases 577, 585 (7th Cir. 1974); cf. Patterson v. American Tobacco Co., 535 F.2d 257, 270, 12 FEP Cases 314, 323-324 (4th Cir. 1976). It is also consistent with Supreme Court's opinion in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 10 FEP Cases 817 (1975). Johnson emphasized that a party proceeding under § 1981 is not restricted by the administrative and procedural requirements of Title VII, but nothing in Johnson suggests that a practice lawful under Title VII can be held unlawful under § 1981. On the contrary, Johnson recognizes that Congress noted that Title VII and § 1981 are "co-extensive" and that they "augment each other and are not mutually exclusive." 421 U.S. at 459, 10 FEP Cases at 819. Johnson gives no indication, however, that Congress

[5] Section 1988 also authorizes resort to state laws for enforcement of the civil rgihts acts if they are not "inconsistent with the Constitution and laws of the United States."

intended to create conflicting and contradictory standards for determining what constitutes illegal discrimination.

We therefore withdraw our mandate and direct that a new judgment issue consistent with this opinion. We remand the case to the district court for reconsideration of the claims made by those employees who were afforded relief on the basis of the seniority system that Teamsters later held to be lawful. The parties suggest that additional evidence may be necessary, and the district court should reopen the proceedings for this purpose. Although the union did not appeal from the entry of the injunction against it, we direct the district court to permit it to move for relief from this order. Fed. R. Civ. P. 60(b)(6). The union's conduct in agreeing to the seniority system violated neither Title VII nor § 1981. Therefore, the judgment against it should be vacated. See, Teamsters v. United States, supra, 431 U.S. at 356, 14 FEP Cases at 1527. In all other respects we affirm the district court for the reasons stated in our initial opinion.

Concurring Opinion

WINTER, *Circuit Judge*, concurring specially:

I concur in the judgment of the court and in parts of its opinion; but since my concurrence rests in part on grounds different from those assigned by the majority, I append this statement of my separate views.

I have no doubt that Teamsters invalidates our affirmance of the district court's conclusion that the company's seniority system violated Title VII, and that we must vacate this portion of our judgment and remand, giving to affected employees the right to present additional evi-

dence and giving to the union the right to have the judgment against it vacated. Where my reasoning differs from that of the majority is with respect to plaintiff's alleged cause of action under § 1981.

I readily agree that under § 1981, standing alone, the plaintiffs' only cause of action was their initial discriminatory employment. Unlike Title VII (42 U.S.C. § 2000-e-2(a)(1), which proscribes discriminatory hiring or firing of an employee *and* other discrimination with respect to "compensation, terms, conditions, or privileges of employment,"[1] § 1981 merely guarantees the black employee the same right to contract for his services "as is enjoyed by white citizens." The right guaranteed by § 1981 was denied when black employees were denied the right to be hired in certain classifications of jobs because of their race. But having obtained initial employment in classifications in which they were accepted, I find no subsequent violation of § 1981 by reason of the seniority provisions of the bargaining contract. After initial employment, the right of blacks to contract was not abridged by reason of their race.

As the majority describes, the seniority provision of the bargaining contract was facially neutral, applying to both white and black employees if they transferred to the higher paying position of line driver. Both black and white employees were subject to loss of their former departmental seniority and in the event of a transfer they would be

[1] Section 2000e-2(a)(2) also proscribes the limitation, segregation or classification of employees or applicants for employment in any way which would deprive or tend to deprive them of employment opportunities or adversely affect their status as empolyees because of their race.

required to start at the bottom of the seniority list for line drivers even though they may have had more employment seniority than line drivers higher on the ladder. The conclusion that the operation of the seniority provision of the bargaining contract to freeze blacks in the less desirable jobs for which they had been hired did not violate § 1981 is supported by Watkins v. United Steelworkers Local 2369, 516 F.2d 41, 49-50, 10 FEP Cases 1297, 1304 (5 Cir. 1975).[2] Although Afro-American Patrolmen's League v. Duck, 503 F.2d 294, 8 FEP Cases 1124 (6 Cir. 1974), and Macklin v. Spector Freight Systems, 487 F.2d 974, 5 FEP Cases 994 (D.C. Cir. 1973), reach a different result, I am more persuaded by Watkins.

If I am correct that the plaintiffs' sole claim under § 1981 was their original discriminatory employment, that claim was barred by North Carolina's three-year statute of limitations, as defendants pleaded in their answers to plaintiffs' amended complaint. See North Carolina Gen. Stat. § 1-52(1).

[2] Chance v. Board of Examiners, 534 F.2d 993, 998, 11 FEP Cases 1450, 1454 (2 Cir.), cert. denied, —— U.S. ——, 14 FEP Cases 1822 (1977), and Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1320 n.4, 8 FEP Cases, 577, 585 (7 Cir. 1974), cert. denied, 425 U.S. 997, 12 FEP Cases 1335 (1976), reach the same result, Chance by the theory that § 703(h) was an implied repeal of § 1981. Waters is more difficult to fathom because the court did not discuss the issue other than to remark that "[h]aving passed scrutiny under the substantive requirements of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of § 1981." I disagree with the rationale of Chance and also with that of Waters if Waters' rationale is that of implied repeal. If the majority's citation of these cases is intended to constitute implied approval of their theory of implied repeal, I disassociate myself from this view. Because Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 457-61, 10 FEP Cases 817, 819-820 (1975), made plain that § 1981 and Title VII were intended to be supplementary and not mutually exclusive. I think that neither can be an implied repeal of the other.

Unlike the majority, I think that § 1988 has nothing to do with this case. The thesis of the majority is that § 1988 imports into § 1981 both Title VII and the judicial gloss which has been placed upon it. The majority says that by virtue of § 1988 the discriminatory practices and procedures of the company, including a facially neutral seniority system which perpetuates past discriminations, held to be a violation of Title VII in Griggs v. Duke Power Co., 401 U.S. 424, 430, 3 FEP Cases 175, 177 (1971), are now also outlawed by § 1981. Stated more simply, § 1981, despite the limited scope of its language, now outlaws that which was proscribed under Title VII. But, the majority reasons, the limitation on Griggs articulated in Teamsters, as a result of § 703(h) of Title VII, is also imported into § 1981 with the result that plaintiffs are not entitled to relief under § 1981. With this reasoning, I disagree.

Section 1988 speaks of the "exercise" of the jurisdiction of the federal courts in civil and criminal matters conferred on them by the Civil Rights Acts and the "enforcement" of those statutes. It requires that both the exercise of jurisdiction and the enforcement of the substantive law be in conformity with the laws of the United States "where such laws are suitable to carry the same into effect." But in all cases in which federal laws "are not adapted to the object, or are deficient in the provisions necessary to furnish suitable *remedies* [emphasis added], the common law, as modified and changed by the constitution and statutes of the State wherein the court . . . is held . . . shall" be applied "so far as the same is not inconsistent with the Constitution and laws of the United States."

I would stress that "exercise" of jurisdiction and "enforcement" refer to the *remedies* available and not to the threshold determination of whether a provision of the Act has been violated. Of course, I do not doubt that § 1988 imports into § 1981 many provisions of federal and state law to cover situations in which § 1981 is silent. A good example is the North Carolina statute of limitations which I think bars plaintiffs' recovery under § 1981 in the instant case. Incorporation of a state statute of limitations relates to remedy nad not to the right to be enforced. In short, the provisions of state and federal law which are imported into § 1981 do not relate to the substantive proscriptions of § 1981; they relate solely to how remedies for acts illegal under § 1981, standing alone, are to be redressed.

Support for my view is found in both Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), and Moor v. County of Alameda, 411 U.S. 693 (1973). In Sullivan where the pertinent issue was the measure of damages to be applied for a violation of § 1982, the Court relied on § 1988 to authorize resort to the state rule which appeared best to serve the policies expressed in the federal statutes. What impresses me is the clear implication in both the majority and dissenting opinions that the sole effect of § 1998 is to provide a *remedy* for violation of the Civil Rights Acts.

Moor is even more specific on the point. There the question was whether state law could be invoked under § 1988 to render a municipality liable for its violation of § 1983, notwithstanding that, under federal law, a municipality had been held not to be a "person" amenable to suit under § 1983. The Court held that it could not, but significantly it rested its view not primarily or solely on the language of § 1988 which made inapplicable "inconsistent"

state rules, but on the ground that § 1988 "was [not] meant to authorize the wholesale importation into federal law of state causes of action—not even one purportedly designed for the protection of federal civil rights." (Footnote omitted.) 411 U.S. at 703-04.

I recognize that Moor was concerned with the application of state law to expand the scope of one of the Civil Rights Acts, while in the instant case we are concerned with the use of federal law to give an expanded meaning to § 1981. But I see no ground for distinction in determining the purpose and effect of § 1988, and I therefore read Moor to hold that § 1988 does not incorporate into and expand § 1981 by the provisions of Title VII, with or without their judicial gloss.

In summary, my reason for denying plaintiffs' recovery under § 1981 is that the only causes of action which plaintiffs have under § 1981 are time-barred.

Opinion of Court of Appeals—April 1, 1977

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-1293

JOHNSON v. RYDER TRUCK LINES

April 1, 1977

Before:

WINTER, BUTZNER and HALL,

Circuit Judges.

PER CURIAM:

Plaintiffs, black employees, former employees and applicants for employment at Ryder Truck Lines, Inc., brought a class action, under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, et seq., against Ryder and the International Brotherhood of Teamsters and its affiliated local, union representatives of Ryder employees. Plaintiffs alleged that blacks were systematically denied employment at Ryder and, if employed, were relegated to menial jobs with no opportunity for transfer. The district court found that defendants had violated the Act, granted broad injunctive relief, and awarded certain class members equitable reinstatement with back pay. The district court further ruled that, while both defendants were guilty of unlawful discrimination, the defendant unions had made good faith efforts to correct past practices prior to trial;

but, by contrast, Ryder was found to have made none. Accordingly, back pay awards were assessed against Ryder alone.

Ryder has appealed. It contests only the back pay award to some of the plaintiffs and to some members of the plaintiff class, and the exoneration of the defendant unions from any back pay liability.

Substantial evidence supports the findings of fact made by the district court. As such, the judgment cannot be overturned as "clearly erroneous." F.R.Civ.P. 52(a). The record indicates that Ryder's hiring standards, allegedly neutral, were applied inconsistently if applied at all. The record also suggests that Ryder's transfer policy (which prohibited transfers outright or conditioned them upon the loss of seniority rights) had the effect of relegating blacks to less attractive tasks. Our analysis of the record discloses a firm evidentiary base for each of the back pay awards that was made, including that to employee Winslow. Finally, the evidence indicates that defendant unions, who previously acquiesced in the unlawful conduct, initiated the only efforts directed at compliance with the 1964 Act.

Affirmed.

Opinion of District Court—January 15, 1976

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

No. Civ. 73-3

JOHNSON v. RYDER TRUCK LINES, INC.

January 15, 1976

McMILLAN, *D.J.*:

This cause having come on for a trial before the Court, sitting without a jury, and the issues having been duly tried, and Findings of Fact and Conclusions of Law having previously been entered, it is, HEREBY ORDERED, ADJUDGED AND DECREED:

1. The defendants, Ryder Truck Lines, Inc. (hereinafter "Ryder" or the "Company"), the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter the "International"), and Local 71, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "Local 71") and their officers, agents, employees, successors, servants and all persons in active concert of participation with them shall be and are hereby permanently enjoined and restrained from discriminating against the plaintiffs, including the intervening plaintiff, and the class of persons represented by the plaintiffs because of their race in violation of Title VII of the Civil Rights Act of 1964, 42

U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981 at the Company's facilities located in Charlotte, Mecklenburg County, North Carolina. "Company," as used herein, shall refer only to the Mecklenburg County, North Carolina, facilities of Ryder.

2. The Company is ordered to offer immediately to William G. Coffey, Jr., if it has not already done so pursuant to this Court's Order dated September 2, 1975, a longline truck driving position with a Charlotte longline seniority date and Company seniority date of September 4, 1956.

3. The Company is ordered to offer immediately to Willie R. Jackson a longline truck driving position with a Charlotte longline seniority date and Company seniority date of September 15, 1957.

4. The Company is ordered to offer immediately to Clyde Long a longline truck driving position with a Charlotte longline seniority date and Company seniority date of September 13, 1969.

5. The Company is ordered to offer immediately to Vincent Gray a longline truck driving position with a Charlotte longline seniority date and Company seniority date of September 13, 1973.

6. The Company is ordered to offer immediately to Sammie Simms a longline truck driving position with a Charlotte longline seniority date and Company seniority date of August 4, 1971.

7. The Company is ordered to offer immediately to Isaiah Massey a longline truck driving position with a

Charlotte longline seniority date and Company seniority date of April 15, 1973.

8. The Company is ordered to offer immediately to James Cowen a longline truck driving position with a Charlotte longline seniority date and Company seniority date of November 1, 1972.

9. The Company is ordered to offer immediately to Rueben Winslow a longline truck driving position with a Charlotte longline seniority date and Company seniority date of September 30, 1969.

10. The Company is ordered to offer immediately to J. D. Grier a longline truck driving position with a Charlotte longline seniority date and Company seniority date of August 12, 1969.

11. The Company is ordered to pay equitable back pay to the persons listed below for the time periods set forth below:

NAME	DATE BACK PAY BEGINS	DATE BACK PAY ENDS
Robert L. Johnson, Jr.	8-18-67	9-6-73
Ernest McManus	8-18-67	9-6-73
William Coffey, Jr.	8-18-67	Date of this Judgment
Willie Jackson	8-18-67	Date of this Judgment
Clyde Long	11- 1-71	Date of this Judgment

NAME	DATE BACK PAY BEGINS	DATE BACK PAY ENDS
Vincent Gray	9-13-73	Date of this Judgment
Sammie Simms	11- 2-71	Date of this Judgment
Tommie Freeman	8-18-67	9-6-73
Isaia Massey	5-11-73	Date of this Judgment
James Cowen	11- 1-72	Date of this Judgment
Rueben Winslow	9-30-69	Date of this Judgment
J. D. Grier	8-12-69	Date of this Judgment

12. The back pay awards set forth above shall be the difference between what each plaintiff or class member would have earned but for the discrimination of the defendants (including all fringe benefits) and that which they actually earned (including all fringe benefits), or should have earned with due diligence, during the applicable time periods set forth above. Each back pay award should be calculated by comparing earnings on a quarterly basis for the applicable time periods for each individual. To each principal award, interest at the rate of six per cent (6%) compounded annually shall be added.

Ryder is further ordered to pay to Messrs. Coffey, Jackson, Long, Gray, Simms, Massey, Cowen, Winslow and Grier equitable monetary relief with interest for any loss of earnings suffered after the date of the entry of this

Judgment until such time as each said individual is given an opportunity to become a longline driver with the Company with a seniority date as set forth above.

Proper allowance should be made in calculating monetary relief for any plaintiffs or class members who would have suffered time out of work due to nondiscriminatory layoff under the applicable bargaining agreements.

Counsel for the plaintiffs and the Company are directed to meet and confer within forty-five (45) days of the entry of this Judgment for the purposes of discussing and agreeing upon the back pay awards of each individual as set forth above. Absent an agreement among those parties, those parties are directed to disclose and exchange pertinent documents and records relevant to this subject and to submit their respective positions concerning back pay to the Court within sixty (60) days of the entry of this Judgment. The Court will thereafter enter an order with respect to any remaining back pay questions.

13. The defendants, unless otherwise authorized by later Order, are ordered to continue to use "carryover seniority," as it is provided for in the 1973 Road and City Cartage contracts.

14. Although the current Shop contract does not provide for "carryover seniority," the Court will not order relief with respect to that agreement because no plaintiffs or class members seek to move from jobs within the Shop agreement to jobs within the Road agreement.

15. The defendant Ryder and all of its supervisors, foremen, officers, and managerial personnel at its Charlotte terminal and all others acting on the Company's behalf and in concert with Ryder are hereby permanently

enjoined from threatening, intimidating, harassing, giving discriminatory job assignments, or using racial epithets directed to present or future black employees or applicants for employment at Ryder's Charlotte terminal. The Company is ordered to conduct, starting immediately, meetings and classes, conducted by employees or, if necessary, by outside professional consultants or teachers, for all its Charlotte supervisory and managerial personnel, sufficient to educate said employes about the laws governing equal opportunity employment and to explain to said employees the terms of this Judgment and the Company's responsibilities under this Judgment and applicable laws.

Ryder shall prepare and circulate to counsel for the plaintiffs a memorandum to be permanently placed on all bulletin boards at the Charlotte terminal. Said memorandum shall emphasize the responsibilities of all supervisory and managerial personnel to refrain from any racially discriminatory actions and shall provide the name of a local responsible Ryder official to whom aggrieved persons can make known the nature of any grievances concerning racial discrimination.

16. The Company is enjoined from laying off or otherwise deleteriously affecting the employment opportunities and working conditions of black garagemen in Ryder's Shop because of the change of job duties whereby mechanics began performing the jobs, formerly done by garagemen, of changing oil and greasing tractors and trailers.

17. Within sixty (60) days from the entry of this Judgment the Company shall develop and implement a training program for the positions of mechanic and trailer mechanic. Said program shall contain a timetable for the

training and promotion of employees to the mechanic and trailer mechanic positions. For every two trainees, one shall be black until at least twenty per cent (20%) of all mechanics and trailer mechanics employed by Ryder in Charlotte are black. Current employees at Ryder's Charlotte terminal shall be given preference for said training and, upon reaching journeyman status, each such employee shall be allowed to utilize his Company (hire date) seniority for all purposes.

18. The Court expressly approves and incorporates herein those portions of the Partial Consent Decree with Respect to Defendant Employers entered in the case of *United States* v. *Trucking Employers, Inc., et al.* (the "TEI" case) which are not inconsistent with this Judgment. It is understood that Ryder is a party to that partial consent decree.

19. The Company is enjoined from implementing, maintaining or giving effect to any criteria or procedure utilized for the selection of supervisory personnel which is designed to or has the effect of discriminating against black employees or black applicants for employment.

The Company is ordered to formulate objective criteria for the promotion or selection of supervisory personnel. Said objective selection criteria for supervisory positions shall be prepared by the Company for all supervisory positions at the Charlotte terminal within sixty (60) days after the entry of this Judgment. The Company shall provide counsel for the plaintiffs with copies of the criteria for the selection of supervisory personnel, and unless the plaintiffs object to the selection criteria within thirty (30) days after receiving said copies, such selection criteria shall be deemed to comply with this Judgment. Copies of the

selection criteria shall be posted on bulletin boards located in conspicuous places throughout the Charlotte terminal.

The Company shall fill vacancies in supervisory positions at the Charlotte terminal with blacks, except when the Company is unable to promote or hire qualified blacks, until the percentage of blacks in supervisory positions approximately equals the percentage of blacks at the Charlotte terminal as of January 5, 1973. The Company is not required to fill any supervisory position with a person not qualified for said position nor is the Company required to retain any person in such position, if after a reasonable time, said person demonstrates he is unable to perform necessary jobs duties adequately.

20. The plaintiffs are hereby awarded their costs in this action including reasonable counsel fees and expenses. Ryder shall pay said costs and fees.

Counsel for the plaintiffs and Ryder are directed to meet and confer within forty-five (45) days of the date of this Judgment for the purpose of agreeing upon costs, reasonable attorneys fees and expenses. Absent such an agreement, (1) counsel for the plaintiffs is directed to file with the Court a statement of time for which counsel fees are claimed and an itemization of costs and expenses, and (2) the defendant Company is directed to file a statement with the Court setting forth the basis by which the Company has compensated its counsel and the total dollar amount it has paid and expects to pay its counsel in this action. If the parties are unable to agree on costs, counsel fees and expenses, the respective statements required herein shall be filed with the Court within sixty (60) days of the entry of this Judgment.

21. Within a reasonable time, not to exceed thirty (30) days, after January 1, 1976, and every six months for a period of three years thereafter, the Company will serve upon plaintiffs' counsel and the Court reports relating to its Mecklenburg County facilities showing data classified in each instance by job classifications and race as follows:

(a) The total number of employees as of the end of the time period.

(b) The number of persons hired and the number of persons terminated during the time period.

(c) The number of applicants for employment whose applications were pending as of the end of the time period.

(d) With respect to those applicants for road driver jobs, reports shall be made of all black applicants for over-the-road positions who are either not considered qualified for hire by the Company or not hired by the Company during the reporting period. Such reports shall include the following:

(i) The applicant's name, address, phone number;

(ii) The applicant's age, height and weight;

(iii) The reason(s) for the applicant either not being considered qualified for hire or not selected to fill any driver vacancy, which is filled during the reporting period;

(iv) The amount of the applicant's straight truck and tractor trailer experience. If the applicant is a graduate of a truck driver school, the Company shall indicate the name and location of such school;

(v) If an applicant is not considered qualified for hire because of his motor vehicle and/or accident record, a

summary of the applicant's driving record shall be included in such reports;

(vi) If an applicant is not considered qualified for hire because of his police or medical record, the Company shall summarize such record; and

(vii) If an applicant is not considered for hire because of any unfavorable references, the Company shall identify to the plaintiffs' counsel only the character of such reference.

(e) The name and race of all employees hired or terminated as supervisors, foremen or managers at Ryder's Charlotte terminal and the date they were hired or terminated. If any supervisory employee is terminated during a reporting period the report should state the reasons for said termination.

22. Ryder is hereby ordered to serve upon plaintiffs' counsel and the Court copies of all reports made pursuant to the partial consent decree in the TEI case.

23. The Company will be responsible for the adoption and implementation of the employment practices and procedures required under this Judgment and for the full and faithful discharge of the duties enjoined upon its officers so as to prevent the development of any pattern or practice of discrimination against the Company's employees or applicants for employment because of race. The union defendants will cooperate to this end. Notwithstanding the remedies provided by law in the event of violations of the terms of this Judgment, no individual will be deprived of any other lawful remedy which he may have against the defendants or any employee, agent or officer

thereof on account of any future individual instances of discrimination, but the defendants shall not be deemed to be in contempt of court unless the violation relates to a duty to be imposed or carried out by an officer of one of the defendants under one of the provisions hereinabove contained.

24. The collective bargaining agreements now in effect between Ryder and Local 71 and all subsequent collective bargaining agreements between these deefndants shall not be affected by this Judgment except insofar as such agreements are inconsistent with the provisions of this Judgment. Should a conflict arise between the provisions of a collective bargaining agreement and the provisions of this Judgment, the terms of this Judgment shall prevail.

25. The Company shall give notice of this Judgment to all of its employees at the Charlotte terminal by posting copies of this Judgment on bulletin boards continuously in conspicuous places throughout the terminal for a period of ninety (90) days immediately following the entry of this Judgment.

26. This Judgment is final and binding on all class members who received notice of this action. It is not binding with respect to those individuals who, in writing, have heretofore sought exclusion from this case.

27. The Court retains jurisdiction of this matter to issue such other orders and to conduct such other proceedings as may be necessary to effectuate this Judgment.

Opinion of District Court—November 18, 1975

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

No. 73-3

JOHNSON v. RYDER TRUCK LINES, INC.

November 18, 1975

McMILLAN, *D.J.:*

This action was tried on August 19, 20, 21 & 25, 1975 upon allegations of the plaintiffs that the defendants had engaged in policies and practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq. ("Title VII") and 42 U.S.C. § 1981 ("Section 1981") and that certain plaintiffs and class members represented by the plaintiffs had been denied employment opportunities as a result of the racially discriminatory practices of the defendants. The plaintiffs seek injunctive relief to remedy the claimed discrimination and to provide specific redress for each individual who has suffered as a result of defendants' discriminatory practices. Based on the evidence, the Court enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

A. *Parties.* 1. Plaintiffs herein, Robert L. Johnson, Jr., Leroy Sloan, Willie R. Jackson, Ernest H. McManus,

Booker T. Alexander and William G. Coffey, Jr., (an intervening plaintiff) are black citizens of the United States residing in Mecklenburg County, North Carolina. The plaintiffs have brought this case as a class action under Rule 23, Federal Rules of Civil Procedure; a class has previously been certified by this Court. Notice to potential class members by publication and two direct certified mailings were ordered and effected prior to trial. The evidence at the trial involved facts relating to a pattern of racial discrimination engaged in by the defendants, the individual claims of the plaintiffs, and evidence concerning the claims of those class members represented by the plaintiffs who have responded to the notices of this case ordered by the Court and who have presented their claims at trial. The rights of W. A. Cauthen, David Irby, Garfield Clanton, Robert W. Blair and Arnold H. Hall, Jr., who requested in writing to be excluded from this action, are not affected by the Court's decision in this case.

2. Defendant Ryder Truck Lines, Inc., (hereinafter "Ryder" or "the Company") is a corporation doing business in Charlotte, North Carolina, with its headquarters in Jacksonville, Florida. Ryder is engaged in the business of interstate trucking and is a common carrier subject to the rules and regulations of the Department of Transportation.

3. Ryder has been operating an interstate common carrier trucking operation in Mecklenburg County since 1952. On April 1, 1966, Ryder began operation of Harris Motor Express (hereinafter "Harris") under temporary authority. The sale of Harris to Ryder was finalized on January 1, 1968, and was approved by the Interstate Commerce Commission on January 1, 1969. The Harris-Ryder long-

line seniority rosters were dovetailed on May 15, 1968. Several of the plaintiffs and class members became Ryder employees when Ryder and Harris merged.

4. Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter the "International") is an unincorporated labor organization with its headquarters in Washington, D. C. Defendant Local 71 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter "Local 71") is an unincorporated labor organization and is an affiliate and agent of the International.

5. This action involves only the Mecklenburg County facilities of Ryder.

6. Ryder is an employer within the meaning of Title VII and the defendant unions are both labor organizations within the meaning of Title VII. The plaintiffs have complied with the administrative and procedural requirements of Title VII, and this action is properly before the Court under both 42 U.S.C. § 2000e, et. seq., and 42 U.S.C. § 1981 with respect to all defendants.

B. *Background Facts.* 7. The Mecklenburg County facilities of defendant Ryder are divided into four primary departments: City Cartage, Longline, Shop, and Office.

The City Cartage department is the Company's warehousing and local delivery section. Interstate freight is sorted by City Cartage employees and loaded for local delivery or for further interstate shipping. The jobs in the City Cartage department are dockworker (also called stevedore, warehouseman, checker, or freight handler), switcher

(also called hostler or jockey) and pick-up and delivery driver (also called local driver or city driver).

The Longline department is Ryder's long distance trucking wing. Longline drivers (also called road drivers or over-the-road drivers) drive large tractor-trailer rigs in interstate commerce.

The Shop department (also known as the Maintenance department) is responsible for all mechanical and servicing work performed on Ryder's heavy tractors and trailers in Charlotte. The jobs in the Shop are mechanic, mechanic helper, trailer mechanic, garageman (also called serviceman) and partsman.

The Office department handles secretarial, clerical and billing responsibilities for the Company.

8. At all times pertinent to this action, Ryder and Local 71 negotiated and had in effect three distinct collective bargaining agreements which control, *inter alia*, questions of seniority. These contracts are (1) the National Master Freight Agreement and Carolina Freight Council Over-the-Road Supplemental Agreement (hereinafter the "Road contract"), (2) the National Master Freight Agreement and Carolina Freight Council City Cartage Supplemental Agreement (hereinafter the "City Cartage contract"), and (3) the Carolina Automotive Maintenance Agreement (hereinafter the "Shop contract"). The basic Road contract and the City Cartage contract are negotiated on a national level. Additions and amendments to the national contract are made by supplemental agreement between a group of regional trucking companies and a group of regional local Teamsters unions. Both Local 71 and Ryder are signatories to the various pertinent contracts. The International, as such, has not signed any of the applicable bargaining

agreements, however, the National Master Freight Agreements are negotiated in part by a union negotiating committee which includes International Teamsters President Frank E. Fitzsimmons and other International leaders. The International through its officers and agents is actively involved in collective bargaining with respect to the City Cartage and Road contracts. The Shop contract is apparently more of local flavor although the International (pursuant to the provisions of the International Constitution) apparently exercises some ultimate control with respect to that contract also.

9. The uncontroverted statistical evidence presented by the plaintiffs at trial is pertinent and compelling.

With respect to the City Cartage, Longline, and Office departments, the racial breakdown of the jobs therein as of July 1, 1965, January 1, 1968, January 1, 1970, and January 5, 1973, was as follows:

Date	Dept. of Job	Black	White	Total
July 1, 1965	Office	0	4	4
	City Cartage (P & D)	4	12	16
	City Cartage (Dock)	17	12	29
	City Cartage (Switchers)	4	2	6
	Line (Drivers)	0	102	102
January 1, 1968	Office	0	6	6
	City Cartage (P & D)	4	12	16
	City Cartage (Dock)	17	12	29

Date	Dept. of Job	Black	White	Total
	City Cartage (Switchers)	4	2	6
	Line (Drivers)	0	105	105
January 1, 1970	Office	0	7	7
	City Cartage (P & D)	4	12	16
	City Cartage (Dock)	17	12	29
	City Cartage (Switchers)	4	2	6
	Line (Drivers)	0	110	110
January 5, 1973	Office	1	10	11
	City Cartage (P & D)	4	12	16
	City Cartage (Dock)	17	12	29
	City Cartage (Switchers)	4	2	6
	Line (Drivers)	5	138	143

10. At the time that Harris merged with Ryder, Harris employed no black road drivers.

11. Between November 1, 1966, and November 1, 1971, Ryder hired 63 white longline drivers and no black ones. Marion Thompson, Ryder's first black longline driver, was hired on November 2, 1971.

12. With respect to the Shop Department the racial breakdown of jobs as of January 1, 1968, January 1, 1970, and January 5, 1973, was as follows:

Date	Department	Black	White	Total
January 1, 1968	Mechanic	0	11	11
	Mechanic Helper	0	2	2
	Trailer Mechanic	0	4	4
	Garagemen	2	6	8
	Partsmen	0	1	1
January 1, 1970	Mechanic	0	10	10
	Mechanic Helper	0	2	2
	Trailer Mechanic	0	4	4
	Garagemen	3	8	11
	Partsmen	0	1	1
January 5, 1973	Mechanic	0	11	11
	Mechanic Helper	1	2	3
	Trailer Mechanic	0	3	3
	Garagemen	6	2	8
	Partsmen	0	1	1

13. The average gross wages (defined as gross wages not reduced by business related deductions") paid to full-time longline drivers by Ryder in the Calendar years 1966 through 1973 were greater than the average gross wages paid to full-time local drivers, dockworkers, switchers, checkers and garagemen during those calendar years.

14. With respect to Ryder's supervisory force in Charlotte, the racial breakdown of supervisors as of July 1,

1965, July 1, 1968, July 1, 1970, and January 5, 1973, was as follows:

Date	Number of White Supervisors	Number of Black Supervisors
July 1, 1965	Approximately 28	0
July 1, 1968	Approximately 26	0
July 1, 1970	25	0
January 5, 1973 ..	27	0

15. As of April 1, 1975, Ryder had never employed any black supervisors, foremen or managers at its Charlotte facilities.

C. *Racial Discrimination with Respect to Road Jobs.*

16. The unrebutted statistical data demonstrating Ryder's failure to hire blacks for certain jobs (e.g., road drivers, mechanics, supervisors) during certain time periods after the effective date of Title VII establishes a *prima facie* case of both past and continuing discrimination on the basis of race in violation of Title VII and 42 U.S.C. § 1981. *Barnett* v. *W. T. Grant Co.*, [9 EPD ¶ 10,199] 518 F.2d 543, 549, 10 FEP Cases 1057 (4th Cir. 1975); *United States* v. *Chesapeake & O. Ry.* [5 EPD ¶ 8090] 471 F.2d 582, 586 (4th Cir. 1972), *cert. den.* 411 U.S. 939 (1973); *Brown* v. *Gaston County Dyeing Machine Co.*, [4 EPD ¶ 7737] 457 F.2d 1377 (4th Cir. 1972), *cert. den.* [5 EPD ¶ 8021] 409 U.S. 982 (1972); *Parham* v. *Southwestern Bell Telephone Co.*, [3 EPD § 8021] 433 F.2d 421 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight*, [2 EPD ¶ 10,283] 431 F.2d 245 (10th Cir. 1970), *cert. den.* [3 EPD ¶ 8139] 401 U.S. 954 (1971); *Rodriguez* v. *East Texas Motor Freight*, [8 EPD ¶ 9811] 505 F.2d 40 (5th Cir. 1974); *Hairston* v. *McLean Trucking Co.*, [6 EPD ¶ 8841 and 7 EPD ¶ 9144] 62 F.R.D.

642 (M.D.N.C. 1974), *remanded for additional relief* [10 EPD ¶ 10,353] 520 F.2d 226 (4th Cir. 1975); *Cathey* v. *Johnson Motor Lines, Inc.*, 398 F.Supp. 1107, 9 EPD ¶ 9874 (W.D.N.C. 1974).

17. This *prima facie* case of racial discrimination established by the statistical data demonstrating that blacks hav not been hired for longline driving jobs by Ryder is buttresssed by other evidence. A number of incumbent black employees of Ryder who were working in jobs under the City Cartage contract testified that they attempted to get longline driving jobs with the Company after July 2, 1965 (the effective date of Title VII). These efforts to obtain a road driving job were uniformly rebuffed. For example, in 1966 Ernest McManus approached Floyd Crozier, a Ryder management employee, and attempted to get a road job. Crozier refused to give McManus such a job, and McManus thereafter was no longer allowed to perform as a local driver for Ryder. William Coffey took a road test in 1966 administered by Tim Timmons, an employee in Ryder's Safety Department. Coffey passed the test but was not given a longline job. Similar attempts made by incumbent employees and applicants to get road driving jobs in 1967 (Tommy Freeman), in 1969 (Coffey, Robert Johnson, Willie Jackson, Freeman, Clyde Long, J. D. Grier), in 1970 (McManus), and in 1972 (James Cowan) proved unsucessful.

18. Indeed, Ryder had a firm policy prior to 1971 of refusing to allow incumbent employees who worked under the City Cartage or Shop contracts to transfer to longline driving jobs even if such employees were willing to forfeit their seniority. This policy perpetuated into the present the past discriminatory hiring policies in violation of

Title VII. *Hairston* v. *McLean Trucking Co.*, [10 EPD ¶ 10,353] 520 F.2d 226, 11 FEP Cases 91 (4th Cir. 1975).

19. Ryder's policy was a consistent one. The Company refused to hire blacks as drivers either from the pool of incumbent employees who desired to transfer to higher paying longline jobs or from the pool of applications of those blacks who were not employed by the Company.

D. *Racially Discriminatory Collective Bargaining Agreements.* 20. Moreover, even if Ryder had not maintained a policy of refusing to allow those employees holding City Cartage and Shop jobs to transfer to longline driving jobs, the seniority provisions of the applicable collective bargaining agreements violated Title VII and Section 1981.

At the time this action was filed, neither the Road contract, the City Cartage contract nor the Shop contract allowed an employee working under the jurisdiction of an agreement to transfer to a job under the jurisdiction of another agreement and carry with him his total terminal seniority for all purposes. Thus, an employee who was hired in Charlotte by Ryder at a time when Ryder absolutely refused to hire black longline drivers and who was working under the City Cartage contract was unable to move to a job under the Road contract without forfeiting his accumulated seniority for job bidding and lay-off purposes. Similar restrictive seniority carryover provisions which put "roadblocks" in the way of blacks seeking equal opportunity have been consistently condemned in other cases involving similar issues and facts in the trucking industry. See, e.g., *Hairston* v. *McLean Trucking Co.*, [10 EPD ¶ 10,353] 520 F.2d 226, 11 FEP Cases 91 (4th Cir. 1975); *Rodriguez* v. *East Texas Motor Freight, supra;*

Cathey v. *Johnson Motor Lines, Inc., supra; Barnett* v. *W. T. Grant Co., supra.*

21. The defendants have failed to demonstrate that the restrictive seniority provisions contained in the applicable collective bargaining agreements were mandated by business necessity. See *Robinson* v. *Lorillard Corp.*, [3 EPD ¶ 8267] 444 F.2d 791 (4th Cir. 1971); *cert. dismissed,* 404 U.S. 1006 (1971); 404 U.S. 1007 (1972). *United States* v. *Chesapeake and Ohio Railway Company, supra,* at 588. To the contrary, Ryder Management employees Bradfield, Woodson, and Briggs testified that they were aware of no reasons why carryover seniority from City Cartage or Shop jobs to Road jobs would not be feasible.

22. Thus, under the facts of this case, in light of the pervasive discriminatory hiring, transfer and promotion practices of Ryder, the collective bargaining agreements in effect at the time of the filing of the Complaint in this action perpetuated into the present the effects of past discriminatory hiring to the detriment of the plaintiffs. The Court finds that the restrictive seniority provisions in the pertinent agreements were violative of Title VII and 42 U.S.C. § 1981.

23. In November, 1971, Ryder, making an exception to its theretofore consistent policy of refusing to allow transfers from City Cartage jobs to Road jobs, offered to all Company employees working in City Cartage and Shop jobs the opportunity to transfer to road driving jobs. The transfers offered, however, required the transferring employees to forfeit all seniority accumulated in their City Cartage or Shop positions for all job bidding and layoff purposes. Several incumbent blacks (e.g., Johnson, McManus, and Freeman) considered this job transfer offer but refused to transfer because they faced a loss of seniority. Ryder's transfer offer of November, 1971 without carryover seniority for all purposes did not purge the Company of its previous discriminatory history. Black employees, who had previously suffered as a result of Ryder's discriminatory hiring and transfer policies, were entitled, if qualified, to receive Longline jobs with full carryover seniority for all purposes including job bidding and, especially, protection from lay-off. Other courts have consistently recognized that blacks who have suffered previous discrimination should not be forced to commit "seniority suicide" by forfeiting important seniority rights which they would have accumulated absent discrimination. See, e.g., *Hairston* v. *McLean Trucking Co.*, [10 EDP ¶ 10,353] 520 F.2d 226, 11 FEP Cases 91 (4th Cir. 1975); *Barnett* v. *W. T. Grant Co., supra; Rodriguez* v. *East Texas Motor Freight, supra.*

24. In the summer of 1973, the collective bargaining agreements in effect at the time of the filing of the Complaint in this action (the Complaint was filed January 5, 1973) expired and new collective bargaining agreements were negotiated. Under the Road contract and the City Cartage contract effective from 1973 to 1976, employees working under one contract may, during any established time period every year, sign a posting for jobs within the other contracts and move from the Road contract to the City Cartage contract or from the City Cartage contract to the Road contract with their full terminal seniority for all purposes when vacancies occur. Under the present pertinent collective bargaining agreements there

still are no provisions for "carryover seniority" out of or into the Shop contract.

25. While the 1973 changes in the seniority provisions in the Road and the City Cartage contracts have made certain relief requested by the plaintiffs unnecessary, the Court in determining Title VII liability must review the contractual situation as of the time EEOC charges and the Complaint in this action were filed. See, e.g., *Parham* v. *Southwestern Bell Telephone Co., supra* at 426; *Brown* v. *Gaston County Dyeing Machine Company, supra;* and *Cathey* v. *Johnson Motor Lines, Inc., supra.* The Court concludes that, under the facts of this case, the pertinent collective bargaining agreements as they existed when this aciton commenced constituted a violation of the applicable statutes.

E. *Participation of the International and Discrimination by the Union Defendants.* 26. The International has contended throughout these proceedings that it has not been involved in any of the discriminatory hiring and promotion demonstrated herein and that it is not a party to any of the pertinent collective bargaining agreements. While the International is not a signatory party to any of the pertinent collective bargaining agreements, International officials play an integral and important role in the negotiation of the National Master Freight Agreements including the seniority provisions at issue here. W. C. Barbee, President of Local 71, testified in his deposition which was admitted into evidence as to the International's role in collective bargaining (p. 8):

> "[With respect to negotiations of the National Master Freight Agreements] it is coordinated and we are assisted in negotiations by representatives of the International . . . ."

Local 71 receives monthly dues from its members and pays to the International a per capita assessment of $2.15 per month for each Member.

27. Moreover, the Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (adopted July, 1971) demonstrates that the International has significant control over the daily business of its local unions, including Local 71. Specifically, the Constitution establishes Joint Councils of local unions (Local 71 is in a Joint Council with five other Locals) and four Area Conferences of local unions. All collective bargaining agreements must eventually be submitted to the International for review of the "working conditions or earnings" contained in said agreements. The General Executive Board of the International, if it deems it necessary, can direct local unions to refrain from executing such an agreement. In addition, the General Executive Board maintains the power to remove local union officers for cause.

28. Thus, the International is deeply involved in the negotiation and approval of collective bargaining agreements and maintains considerable control over local unions. While local unions apparently retain some autonomy, the International maintains a broad widely-defined supervisory and veto power. If the International had insisted, as it had authority to do pursuant to its Constitution, the collective bargaining agreements involved in the case which did not allow carryover seniority from City Cartage to Road and which, under the facts of this case, were in vio-

lation of Title VII and 42 U.S.C. § 1981 would not have become effective. The International's failure (as well as that of Local 71) to take steps to assist its black members who had been the victims of racial discrimination makes the International, at least with respect to its ratification of past collective bargaining agreements, a party to the violation of the applicable statute. *Cathey* v. *Johnson Motor Lines, Inc., supra.*

29. Indeed, while neither the International nor Local 71 is engaged in hiring or selection of supervisory personnel, the results of the Company's hiring practices are so blatant that the unions, especially by allowing perpetuation of discrimination in the applicable collective bargaining agreements, have become participants in the Company's discriminatory conduct by means of their "passivity at the negotiating table." *Hairston* v. *McLean Trucking Co.*, [6 EDP ¶ 8841 and 7 EDP ¶ 9144] 62 F.R.D. 642 (M.D. N.C. 1974) (fn. 10); *Cathey* v. *Johnson Motor Lines, Inc., supra.*

30. The union defendants have simply failed to carry out their responsibility to represent their black members by combating the Company's discriminatory hiring, transfer, and promotion practices. In this regard, as well as with respect to maintenance of the restrictive seniority provisions in the collective bargaining agreements, the union defendants have violated Title VII and Section 1981.

F. *Affirmative Action Taken by the Unions.* 31. While the union defendants have violated the applicable statutes, they, in contrast to the actions of Ryder, did take serious steps to attempt to alter the discriminatory collective bargaining agreements. The evidence with respect

to efforts made by the unions to amend the pertinent contracts is helpful in deciding the proper allocation of monetary relief and costs in this action.

32. Local 71 is represented during collective bargaining negotiations by the Carolina Freight Council (the "Council"). The Council bargains with the Carolina Motor Carriers Labor Negotiating Committee (the "Committee") which represents, among others, the Carolina Transportation Association, Inc., of which defendant Ryder is a member.

Beginning in 1967, Local 71, through the Council, began to attempt to liberalize the seniority transfer provisions of the various collective bargaining agreements pertinent to this action. In that year, the Council proposed to the Committee, but did not obtain, a provision to allow garagemen to fill mechanic helper positions in preference to new hires. During the next negotiations in 1970, the Council proposed and obtained a contract provision allowing garagemen to bid on mechanic helper vacancies. On February 8, 1972, the unions proposed seniority provisions that would permit employees to transfer across departmental lines within the Shop contract and carry their seniority with them. They also proposed that maintenance employees be permitted to transfer to jobs within the bargaining unit covered by the City Cartage and Road contracts.

33. On September 21, 1972, after being informed that the employers' signatory to the Shop contract was not interested in bargaining on the seniority issues, the unions filed charges against the employers with the National Labor Relations Board. These charges were subsequently dismissed by the NLRB's Regional Director, and the dis-

missal was upheld on appeal by the NLRB's General Counsel. During 1973 negotiations, the unions proposed and were successful in obtaining contract provisions enabling maintenance employees to transfer across departmental lines and carry with them their full garage seniority. The issue of tranfer between the Shop and Road and City Cartage Contracts was not pressed during the 1973 negotiations because the Unions were advised by counsel that under the National Labor Relations Act they could not compel the employers to negotiate across bargaining unit lines.

34. Beginning in 1969, the unions also began efforts to liberalize the seniority provisions of the City Cartage and Road contracts.

In 1970 the Council proposed and obtained provisions allowing City Cartage employees to move between classifications covered by the City Cartage contract and retain their full terminal seniority. During the 1970 negotiations, the unions attempted unsuccessfully to obtain cross-over bidding between Road and City Cartage jobs. Under the unions' proposal, City Cartage employees would have been entitled to transfer to the bottom of the Road board and retain the seniority they had accrued in their City jobs. While the transferees under the 1970 proposal would not have been entitled to use their seniority accrued under the Road contract, transferring employees could have used such seniority to return to City Cartage positions in the event of layoff from Road jobs.

35. In February, 1972, the unions abandoned this bumpback seniority position, proposing instead that employees be permitted to transfer between City Cartage and Road jobs with full terminal seniority for all purposes. This

proposal was not accepted by the employers in 1972 and became part of the unions' negotiating package during the 1973 contract negotiations. The seniority issue was the last to be resolved during such negotiations, and, as discussed above, the 1973-76 City Cartage and Road contracts provide for annual bidding with full seniority carry-over between City Cartage and Road jobs.

36. Thus, the evidence indicates that the union defendants periodically made serious efforts to alter the restrictive seniority provisions of the pertinent collective bargaining agreements. There is no evidence that Ryder, either acting alone or through the Committee, made any similar efforts.

G. *Discrimination in the Job of Mechanic.* 37. The evidence with respect to the job of mechnic at Ryder demonstrates an unrebutted *prima facie* case that the Company has refused to hire or promote blacks to mechanic jobs because of their race. See, *Brown* v. *Gaston County Dyeing Machine Co., supra; Barnett* v. *W. T. Grant Co., supra.* This evidence with respect to hiring is compounded by the restrictive seniority provisions of the Shop contract which, until 1973, did not allow intradepartmental transfer without loss of seniority and which, to this date, does not allow for seniority transfer to City Cartage or Road jobs.

H. *Discrimination in the Selection of Supervisors.* 38. The statistical data also is persuasive with respect to the hiring and promotion of supervisory personnel. *Barnett* v. *W. T. Grant Co., supra.* While Ryder did offer three blacks supervisory jobs between 1965 and 1975, those job offers were made in the racially discriminatory atmostphere created by the Company's biased policies. Moreover, Ryder

maintains no objective criteria for the selection of supervisory personnel. Supervisory vacancies are not posted. Given the evidence in this case, the failure of the Company to utilize objective criteria in the selection of supervisors constitutes a violation of Title VII. *Rowe* v. *General Motors Corp.*, [4 EPD ¶ 7689] 457 F. 2d 348 (5th Cir. 1972); *Russell* v. *American Tobacco Co.*, [5 EPD ¶ 8447] 374 F. Supp. 286 (M.D.N.C. 1973) *modified*, [10 EPD ¶ 10,412] —— F.2d —— (4th Cir. 1975) (issues discussed are not here pertinent).

I. *Additional Discriminatory Practices.* 39. In addition to the racially discriminatory hiring, promotion, and transfer policies maintained by the Company, racial discrimination with respect to other terms and conditions of employment of blacks was demonstrated by the evidence. In 1966 Ryder, as is customary in the Charlotte area, planned Christmas festivities for its emloyees. The Company, however, decided to have two Christmas parties, one for its white employees and one for its black workers. When the black employees at Ryder learned that the Company was going to alocate more money for the party for the whites they objected to that scheme and suggested that one party for all employees be held. The Christmas parties were eventually cancelled.

40. As a result both of the Company's refusal to hire blacks for certain jobs and of the Company's other discrimiatory conduct, Ryder developed a reputation in the Charlotte black community of discriminating against blacks in employment opportunities.

J. *Criteria and Policies for Hiring Road Drivers.* 41. Much of the evidence at trial consisted of attempts by the

defendant Company to establish its hiring standards for the position of longline drivers and to demonstrate that the plaintiffs and class members did not meet the Company's alleged neutral non-discriminatory requirements. In this regard, Ryder maintained during the trial that it hired road drivers based on a careful review of each applicant's driving record, accident record, experience, training and professional background. The evidence, however, indicates that the asserted criteria were exercised subjectively, arbitrarily and discriminatorily and that whites have been hired as longline drivers since 1966 with driving and accident records, training, experience and background that were no better than (and in many cases considerably inferior to) the comparable records of black applicants for longline and driving jobs.

42. Contrary to the Company's contention that certain criteria were consistently and even-handedly used, Ryder hired during the period 1966 to 1973 white drivers whose records indicated serious deficiencies with respect to the standards allegedly established by the Company to select drivers. For example:

(a) White drivers were hired who had numerous traffic convictions prior to their date of hire. (e.g., W. S. Kidd—13 convictions; Don Jenkins—14 violations including at least eight speeding tickets while driving a truck; and R. E. Hendrickson—6 convictions in less than three years).

(b) White drivers were hired who had records of multiple accidents prior to their date of hire. (e.g., B. F. Clontz—at least four accidents while driving a truck; Don Jenkins—four accidents; C. L. Melton—four accidents).

(c) White drivers were hired even though there were substantial variations in the number of convictions and/or accidents listed on their applications for employment and the accidents and convictions they actually had received as indicated on driving record checks obtained from the pertinent state department of motor vericles. (e.g., W. S. Kidd, C. L. Melton, Don Jenkins, H. L. Overcash, D. A. Wiseman).

(d) White drivers were hired for permanent road jobs without the Company obtaining copies of their driving records from the pertinent state department of motor vehicles. (e.g., J. A. Merritt, W. D. Bynum, J. H. Green, W. C. Andrews, W. D. Harris, B. F. Clontz, W. C. Helms, J. L. Shannon, C. J. Wise).

(e) White drivers who had driving licenses and a previous history of driving in states other than North Carolina were hired by the Company as road drivers even though copies of their out-of-state driving records were never obtained. (e.g., B. F. Clontz, R. E. Crosby, J. E. Danner, J. H. Green, C. O. Ingle).

(f) White applicants for road driving jobs who had a history of previous medical disorders were allowed to take the physical examination required by the Department of Transportation and administered by Ryder's company doctor and, if they passed that physical, were put to work. At least one similarly situated black was treated differently to his detriment. [Compare, e.g., the applications showing the medical histories of whites C. E. Wimberly (high blood pressure corrected by medication) and R. J. Gwaltney (two hernias corrected by surgery) with that of black James Cowen (a back injury from which he had "completely recovered")].

(g) At least one white driver was allowed to "force on" the permanent longline seniority roster by staying on the job as a road driver for over 30 days (Don Jenkins) while blacks, allegedly hired only on a casual basis, were not allowed to get on the board as permanent drivers (Leroy Sloan and Sammie Simms). See *Sabala* v. *Western Gillette, Inc.*, [10 EPD ¶ 10,360] 516 F. 2d 1251, 1258-59 (5th Cir. 1975).

(h) The Company hired a number of whites as road drivers who had little or no over-the-road driving experience (e.g., James Tucker, Frank Walters, Gary Beaver, Rufus Freeman, J. W. Hyde, L. K. Swanger, L. K. Shamburg, R. E. Crosby). These drivers apparently preformed as well as other drivers hired who had greater experience.

43. The Company's chief witness, D. T. Bradfield, who was responsible for hiring over-the-road drivers for Ryder in Charlotte from about 1967 to the fall of 1974, admitted that a number of the plaintiffs and class members had talked to him at numerous times about becoming road drivers. A number of these black applicants (e.g., Robert Johnson, Wiliam Coffey, Clyde Long, Wilie Jackson) testified that they had filed written application for longline jobs. The fact that the Company was unable to produce their applications at trial is explained by the facts that Ryder simply did not consider blacks for Road jobs and that until about 1972 or 1973, Ryder's policy was to destroy most applications for employment after retaining them for about one year.

44. Ryder hired one black road driver in 1971, and hired others in late 1972 and 1973. This change in policy occurred only after a number of EEOC charges had been filed against the Company alleging racial discrimination

and after the filing of this lawsuit. This Court is required to give careful scrutiny to policy changes made in the face of impending and pending litigation. See e.g., *Parham* v. *Southwestern Bell Telephone Co., supra.*

K. *Summary of Discriminatory Practices.* 45. Thus, the evidence with respect to Ryder indicates a systematic and pervasive policy of racial discrimination. The Company maintained a practice of refusing to hire blacks as longline drivers, mechanics and supervisors. Moreover, Ryder perpetuated into the present the effects of past discrimination by maintaining an unjustifiable no-transfer policy and by refusing to alter collective bargaining agreements which contained seniority provisions consistently condemned in similar Title VII litigation. Despite the obvious futility faced by a black man attemptng to get a white job, certain of the plaintiffs and class members made overt attempts to better themselves. Their applications and inquiries were met by obstinate refusals, retaliation and discouragement as well as by settled transfer and seniority policies which made attempts by the black employees and applicants to better their lot both futile and perilous.

L. *Evidence of Discrimination with Respect to Individuals.* While the Court finds that defendants have engaged in a pattern and practice of racial discrimination, the question with respect to whether or not specific individuals have suffered from the racially discriminatory policies and the proper remedies, if any, depends on the specific facts relating to each individual case.[1]

[1] Questions of discrimination against specific individuals and the appropriate relief often depend on resolving issues of credibility. In deciding the individual cases herein the Court relies on all the background evidence presented at trial as well as the credibility of individual witnesses, including their demeanor, and the records and documents contained in the record of this case.

In this light, the Court finds, with respect to the individuals who claimed they were injured by the defendants' racial discrimination and who testified at trial as follows:

46. Robert L. Johnson, Jr. Plaintiff Johnson was originally hired by Harris on September 20, 1952, as a stevedore under the City Cartage contract. Johnson became an employee of Ryder with the Harris-Ryder merger.

In 1969, Johnson filed a written application to become a road driver with Ryder and turned it in to a Company longline dispatcher by the name of Whitlow. He later talked to D. T. Bradfield, the Ryder employee in charge of hiring road drivers at the time, who told him that it was against Ryder policy to transfer employees from the dock to the road and that Johnson would have to forfeit all of his seniority even if he was allowed to transfer. Johnson had been encouraged to file an application for road driver in 1969 by George Moore, a federal government official.

Johnson had not applied for a Road job in 1966, 1967 or 1968 because he knew that all of Ryder's road drivers were white, that it would be futile to make such an application, and that Ryder was then running many double teams (i.e., runs requiring two drivers) which would require the hiring of two blacks to drive together.

In 1971, Johnson, like all other Ryder employees in Charlotte, was given an opportunity for the first time to transfer from his City Cartage job to a Road job if he was willing to forfeit all of his accrued seniority (with the exception of vacation and other fringe benefits). Johnson originally signed a document indicating his desire to make that transfer but decided against transferring on the advice of his attorney because he would have been forced to lose all of his accrued seniority. Since he had signed

up for the 1971 transfer, Johnson was required to sign a letter dated November 5, 1971, stating that he refused to transfer because of his "lack of experience" in order to obtain his old job under the City Cartage contract. The Court finds as a fact that Johnson did not dictate the November 5, 1971, letter that he signed and that he did not lack driving experience in 1971.

In 1973, after the pertinent collective bargaining agreements were amended to allow carryover seniority, Johnson transferred to a road driving job, took two trips to Hagerstown, Maryland, and then decided that he would return to his job under the City Cartage contract. Johnson decided to reject the Road job opportunity in 1973 because he had gotten older and because he had assumed increased responsibilities with his church in Charlotte which required him to be in town.

Johnson's truck driving experience consisted of significant driving experience for Harris and Ryder as a local driver during the twenty or more years he has worked in the trucking industry. He also took a trip to Ohio over the road in 1971 for the American Cyanamid Company. Moreover, Johnson passed the road test and drove for Ryder in 1973 without accident.

Johnson filed his first charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on August 18, 1969. This charge was investigated and, together with additional EEOC charges filed by Johnson and other plaintiffs, formed the basis for satisfying the procedural requirements of Title VII. All such requirements of this type have been met.

The Court finds as a fact that Johnson was fully qualified to be a road driver for Ryder in 1966 and thereafter and that he was denied a job as an over-the-road driver

with the Company from 1966 to 1973 when he first received an opportunity to take a road job with Ryder with full carryover seniority. Since Johnson received an opportunity to transfer to the road in September 1973, he should be awarded equitable back pay from August 18, 1967, until September 6, 1973. No adjustment in his seniority date is required on this record.

47. Ernest McManus. Plaintiff McManus was first employed by Ryder in 1951 in the City Cartage department. Soon thereafter he went into military service and was reemployed by the Company in 1953 upon his discharge. In 1953 McManus asked Jack Sperling, Ryder warehouse superintendent, for a road driving job. At that time, of course, Ryder had no black drivers. About two or three weeks later Sperling told McManus that it "wouldn't work."

In 1966 when McManus' wife contracted cancer, McManus approached Floyd Crozier, explained the situation involving his wife's illness and his need for more money, and asked for a Road job. Crozier refused to give him a longline driving job and accused McManus of trying to "start something." McManus testified and the Court finds as a fact that he would have taken a longline driving job with Ryder in 1966 if it had been offered to him.

In 1970 McManus orally requested from D. T. Bradfield a road driving job. Bradfield, at that time, refused to offer McManus an over-the-road job and replied that Ryder had "no facilities" for blacks. McManus did not apply for a Road job between 1966 and 1970 because he knew that all of the road drivers at Ryder were white and that blacks would be unable to get a longline driving job.

In 1971 McManus, like other Ryder employees in Charlotte, was given an opportunity to transfer to an over-

the-road job but did not do so because he would have had to forfeit his seniority. When he asked Bradfield in 1972 for a Road job Bradfield replied that McManus had forfeited his opportunity to transfer to a road job when he refused to do so in 1971. In 1973 when McManus was finally given an opportunity to transfer to an over-the-road job and carry with him his full seniority he did so and is presently a longline driver in good standing with the Company.

McManus gained significant experience driving trucks while working for Ryder and driving locally and in the yard. After 1966 when McManus approached Floyd Crozier and asked about a road driving job McManus was no longer allowed to drive locally for the Company. McManus passed the Department of Transportation road test in 1973 and has been driving with the Company since that time.

The Court finds as a fact that McManus was qualified to drive over-the-road for Ryder in 1966 and at all times thereafter, and that he was denied a Road job in 1966 and thereafter because of his race. He is entitled to equitable back pay from August 18, 1967 to September 6, 1973, the date he obtained the status of road driver with the Company with his full seniority for all purposes.

48. William Coffey, Jr. Intervenor Coffey was first employed by Ryder on September 4, 1956 as a checker. Because of his seniority standing with the Company, Coffey was often laid off from his City Cartage jobs. Coffey asked for a road driving job with the Company on several occasions when he was on layoff; however, all such requests were refused.

Sometime about 1966 or 1967 Coffey was given a road test by Tim Timmons, a safety supervisor for Ryder.

Coffey was informed that he had passed the road test but was never offered a longline job. Coffey did not make a formal written application for a road driving job from 1966 to 1969 because he knew that all of the road drivers employed by Ryder were white and that it would be futile for him to attempt to get such a job.

About April, 1969, shortly after he was again laid off from his City Cartage job, Coffey filed a written application for a Road job with Ryder. When the Company would not offer him a job as a road driver, Coffey, who was then on layoff and who needed a job to take care of his family and other obligations, resigned his employment from Ryder and took a job with Hennis Freight Lines ("Hennis"). Coffey was required by Hennis to resign at Ryder before Hennis would hire him. The Court finds as a fact that Coffey was denied a Road job with Ryder in 1966 or 1967 and in 1969 because of his race and that he would have accepted a longline driving job with the Company at those times. Coffey's resignation in 1969 was, in effect, compelled by the continuing discriminatory policies of Ryder, and the Court finds Coffey would not have resigned if he had been given a road driving job.

In 1972 D. T. Bradfield began attempts to hire Coffey as a road driver and Coffey finally came to work for the Company on May 11, 1973 as a road driver. At the time of the trial he was laid off from his road driving position with the Company but would not have been on layoff if he had maintained his initial hire date with the Company in 1956 as his road seniority date.

Coffey obtained driving experience while he served in the United States Army from 1946 to 1949 and while working for Ryder and Harris driving locally. He successfully passed the road test for Ryder in 1966 or 1967 and was

qualified to drive for Ryder at least since that time. Since he was qualified for but was denied a Road job because of his race Coffey is entitled to be offered a longline job with Ryder with a seniority date of September 4, 1956. This is the seniority date Coffey would now have if he had been given a Road job in 1966 or 1969 since the 1973 collective bargaining agreements would have allowed him to recoup his hire date seniority. Coffey is also entitled to equitable back pay from August 18, 1967, to the present including all times he has been on layoff from Ryder since returning as a road driver in 1973.

49. Willie Jackson. Plaintiff Jackson began working at Harris as a stevedore in 1957. He became an employee of Ryder when Harris and Ryder merged. In 1969 Jackson filed a written application for an over-the-road job with Ryder, at the same time that plaintiff Robert Johnson and class member Clyde Long applied for Road jobs. Jackson had not applied for a Road job prior to 1969 because he knew that the Company employed only white road drivers, because he knew that it would be futile for him to attempt to get a Road job, and because he knew he would have to forfeit his accrued seniority if he did get a Road job.

At approximately the same time that Jackson applied for a Road job with Ryder in 1969 he was laid off from his City Cartage job. After several years of being laid off and re-called on several occasions by Ryder, Jackson left his dock job with the Company and took an over-the-road driving job with the Dixie Trucking Company ("Dixie") where he is still employed.

Jackson gained significant experience driving for Ryder and Harris locally and also driving for Dixie. While Jackson had some accidents while working in the yard for

Ryder, these accidents were of the "fender-bender" variety. White drivers have been hired by Ryder with more serious accident records.

The Court finds as a fact that Jackson was denied a job with Ryder as an over-the-road driver from 1966 to 1969 and that he was fully qualified to drive at all times pertinent to this case. Jackson is entitled to equitable back pay from August 18, 1967 until the present. He is also entitled to be offered a Road job with Ryder with a seniority date of September 15, 1957.

50. Clyde Long. Class member Long applied for an over-the-road job with Ryder in 1969. He filled out an application when he went to the Company's offices with plaintiff Jackson. Long took the pertinent road test but was never told by the Company whether he had passed it, and was never called by the Company nor offered an opportunity to drive for Ryder. Long went back to Ryder several times to check on his application but never received a job offer from the Company. On one occasion he was told by Donald Bradfield that he did not have enough experience to drive for Ryder.

Prior to 1969 Long had at least twenty years over-the-road driving experience. As of July, 1969, he had received no driving convictions and had had no accidents.

The Court finds as a fact that Long was qualified to be an over-the-road driver in 1969 and was denied a Road job at that time because of his race. Long is entitled to equitable back pay from November 1, 1971 (the first date road drivers were hired after September 1969) to the present and to be hired as a road driver with a longline seniority date of September 13, 1969 (the day after the last road driver was hired in 1969).

51. JOHNNY ALEXANDER. Class member Alexander testified that he applied at Ryder in May or June, 1971, and never heard anything from the Company pursuant to his application. He also testified that he attended the Griffin Truck Driving School in Hickory, North Carolina and graduated from that school.

Ryder was unable to find a written application filed by Alexander in 1971; however, an application for a driving job filed October 4, 1973, was uncovered. Since the evidence indicates that Alexander lacked truck driving experience in 1971 and that the Company has hired only six drivers since October 4, 1973, the Court concludes that Alexander was denied a Road job for reasons other than his race. All his claims for relief are denied.

52. VINCENT JOSEPH GRAY. Class member Gray applied for a Road job with Ryder in 1973. At that time, Gray was living in Englewood, New Jersey, but was prepared to come to Charlotte and did move to Charlotte shortly after he applied with the Company. Despite the facts that Gray had at least three years of driving experience in New Jersey and had passed a course with Ryder Truck Driving School (a school which is not affiliated with the defendant Company), Gray was never contacted by Ryder. When he came to Charlotte in 1973, Gray, who had had significant previous driving experience, passed the road test for Johnson Motor Lines, Inc., a large, long-distance trucking company, and worked for that firm until he was laid off. White applicants with less experience then Gray (e.g., J. K. Lee, T. A. Meggs, T. C. Mullis, B. S. High, G. A. Beaver, R. E. Crosby) and who had a history of driving in states other than North Carolina (e.g., J. E. Danner, R. E. Crosby, B. F. Clontz, J. H. Green) were hired by the Company between 1966 and 1973.

The Court finds as a fact that Gray was qualified to be a road driver in 1973 and was denied a job in 1973 because of his race. He is entitled to equitable back pay from September 13, 1973 to the present and to be hired as an over-the-road driver with Ryder with a longline seniority date of September 13, 1973.[2]

53. SAMMIE SIMMS. Class member Simms applied with Ryder for an over-the-road driving job in 1971. He took and passed the road test administered to applicants for longline driving jobs. At that time, Simms had experience which included driving for two years in the United States Army, driving for Wilson Transfer, for whom he drove as far as Georgia and Mississippi, and driving for Nolan Concrete Company.

Simms was placed on the Board as a casual road driver for Ryder but was never called to drive for the Company and never drove for the Company. On August 16, 1971, he received a letter from the Company telling him that his employment had been terminated but that he would be offered a job again when the Company began hiring road drivers. Immediately prior to Simms' termination, the Company had received "static" from certain white road drivers because Simms, Leroy Sloan (a black) and a man named Street (a white) had been hired as casual road drivers.

Simms has never been recalled by the Company or offered an over-the-road job since 1971 and has never driven one run for the Company. Ryder offered no explanation at trial as to why Simms, an admittedly qualified driver, was never given a driving opportunity after Au-

[2] The date September 9, 1973, is chosen for Gray's seniority date and as the date from which back pay is measured because all drivers hired by Ryder after September 13, 1973 applied after May, 1973.

gust, 1971. While Simms would have preferred taking a permanent road driving job with Ryder in August , 1971, he was willing to drive on a part-time basis. Indeed, he went by the Company's terminal on several occasions in August, 1971 seeking work but was never given any. A number of white drivers were hired in 1971.

The Court finds as a fact that Simms was qualified to be an over-the-road driver in 1971 and was not hired by the Company because of his race. He is entitled to equitable back pay from November 2, 1971 (the date the first permanent road driver was hired by Ryder after August, 1971) to the present and to be hired as a longline driver with a road seniority date of August 4, 1971 (his original date of hire with the Company).

54. James Smith, Jr. Class member Smith applied for an over-the-road job with Ryder in July, 1972. He was never contacted by the Company and never went back to the terminal to check on the status of his application.

Although the Court retains some question as to the reason why Ryder did not follow up on Smith's application (his driving record was not checked until 1974), the Court concludes, in view of Smith's driving record which shows numerous convictions and license suspensions, that Smith's record would have prevented him from getting a Road job in 1972. All of Smith's claims for relief are denied.

55. Tommie Freeman. Class member Freeman began working for Harris in 1957 in a job under the City Cartage contract. He became a Ryder employee when Ryder and Harris merged.

In 1967 Freeman asked Ryder official Earl Hunsinger about a job driving over-the-road for Ryder. Hunsinger

informed him that it was against Company policy to transfer from a City Cartage job to a Road job. In 1969 Freeman again sought an over-the-road job and talked to Don Bradfield about driving but was not offered a job. He talked to Bradfield again in 1970 and received a similar response.

In 1971, Freeman did not avail himself of the opportunity to transfer and become an over-the-road driver because it meant losing his Company seniority. In 1973 Freeman was offered a Road job with full seniority pursuant to the 1973 contracts, but did not transfer because his wife became sick during the week when transfers were taking place. He signed a slip (dated September 7, 1973) stating that he desired to be given his City Cartage job back and that he did not desire to transfer to the road "for the time being."

Freeman had significant driving experience since 1957 driving for Harris and Ryder in Charlotte and in local runs out of Charlotte.

The Court finds as a fact that Freeman was qualified to be a road driver with Ryder in 1967 and in 1969 and that he was denied a job at those times because of his race. Freeman is entitled to equitable back pay from August 18, 1967, until September 6, 1973, when he turned down an opportunity to move to a road driving job with his full seniority. No adjustment in his seniority date is required on this record.

56. Isaiah Massey. Class member Massey applied for a Road job with Ryder in 1972. He was employed by the Company as a longline driver in April 1973. Prior to the date he was employed, he passed the Department of Transportation test and all other tests required by the Company.

After becoming a road driver with Ryder, Massey made several trips to the Company. His performance on those trips was satisfactory.

While Massey was on one trip for the Company, D. T. Bradfield, the Ryder employee in charge of hiring road drivers, received a copy of Massey's driving record from the North Carolina Department of Motor Vehicles. The driving check indicated that Massey's driving license had previously been suspended. When Massey returned from his road trip, he was terminated by the Company even though he stated to Bradfield that the suspension as listed on the Department of Motor Vehicles check was erroneous.

Prior to being suspended by the Company, Massey had a conversation with Lonnie Elder, a black switcher for the Company, wherein Massey complained that black drivers were given the older trucks to drive while white drivers were given the newer trucks. The evidence indicates that Elder had frequent conversations with D. T. Bradfield concerning Company business.

The treatment accorded Massey is significantly different from that given by the Company to Don Jenkins, a white driver. Jenkins, by mistake, worked more than thirty days days for the Company and was "forced on" the longline seniority roster because the Company failed to terminate him before his thirty-day probationary period ended. Jenkins was allowed to remain as a driver for Ryder despite the fact that he had falsified his application and that he had received numerous traffic citations. Massey, in contrast, was immediately terminated by the Company.

Ryder has provided no satisfactory explanation as to why Massey was treated differently by the Company than Don Jenkins. The Court concludes that Massey was terminated from his job on account of his race. He is entitled

to be reinstated with a longline driving seniority date of April 15, 1973, and with equitable back pay from May 11, 1973 (the date Massey was terminated) until the present.

57. Willie Thompson. Class member Thompson testified that he went to Ryder in 1968 and asked about a Road job but was told that the Company was not hiring any drivers at that time. Ryder hired no longline drivers in 1968. Thompson never followed up his initial inquiry and never filed a written application until 1973.

In 1973 Thompson did file a written application with the Company. The Court finds as a fact that Thompson was qualified to be a road driver in 1973; however, his application was not filed until November 8, 1973. Ryder has hired no drivers since November 29, 1973, and has hired no drivers who applied as late as November, 1973.

Under all the circumstances of this case the Court concludes that Thompson was not denied a job because of his race. All of his claims for relief are denied.

58. Stroud Johnson. Class member Stroud Johnson worked for Ryder on a casual basis as a dockworker under the City Cartage contract in 1973. He claimed at trial that white casual workers with less time than he with the Company were hired as permanent dockworkers. He has never been offered a job as a permanent dockworker. The statistical data in this case does not create an inference that Ryder has had a policy of refusing to hire blacks as dockworkers. Under all the circumstances of this case, the Court concludes that Stroud Johnson was not denied a job because of his race. All of Stroud Johnson's claims for relief are denied.

59. Richard Williams. Class member Williams applied for a Road job with Ryder in 1972 and was hired several weeks thereafter. From the beginning of his employment with Ryder, the Company had difficulty in reaching Williams when they needed him to come and drive. He was suspended or discharged three times by the Company because of his unavailability for work and because the Company could not contact him. Each time he was reinstated after discussions with Local 71 and with Williams. Finally, on May 14, 1973, he was discharged by the Company again for his unavailability for work. A white driver was similarly discharged (C. L. Marshall).

Based on all the evidence, the Court concludes that Williams was not terminated because of his race but was terminated because of his failure to follow the rules of the Company. All of Williams' claims for relief are denied.

60. James Cowen. Class member Cowen applied for a job with Ryder on July 12, 1972. At that time, he filed a written application, but he never heard from the Company.

D. T. Bradfield testified that Cowen was not offered a job because of a previous back injury. Cowen, however, stated on his application that he had completely recovered from any injury to his back. The evidence indicates that at least two white drivers (C. E. Wimberly and R. J. Gwaltney) who had previous medical problems were sent to the Company doctor for a physical to determine if their problems still existed at the time of their application with Ryder. Cowen was not sent to the doctor despite the fact his application clearly indicated he was suffering no disability.

As of July, 1972, Cowen had over-the-road driving experience with Guignard Freight Lines and with Lloyds Motor Express.

The Court concludes that Cowen was qualified to be a road driver for Ryder and was denied a job in July, 1972, because of his race. He is entitled to be hired by the Company with a longline seniority date of November 1, 1972, and with equitable back pay from November 1, 1972, until the present.[3]

61. Leroy Sloan. Plaintiff Sloan applied for a Road job with Ryder in July 1971. He was hired several days later as a casual road driver and allowed to make several trips for the Company. On August 16, 1971, he was terminated by the Company.

Subsequently, the Company learned that Sloan had falsified his application. In the pertinent portion of the application form he had stated that he had never had any accidents or driving tickets. A check of his motor vericle record indicated that Sloan had had numerous traffic tickets and had had his license suspended on several occasions.

Sloan was never re-called by the Company as a road driver; however, he did begin working for Ryder in 1972 as a garageman under the Shop contract. While working in the Shop, Sloan and other black garagemen were given the dirtier, more difficult jobs to do by the maintenance supervisory personnel, while white garagemen, including Ray Connors, were often given less demanding tasks. Sloan suffered from this discriminatory assignment of work.

[3] The date November 1, 1972, is chosen for Cowen's seniority date and date for back pay purposes as a representative date by which time his application could have been checked by Ryder thus making him eligible for employment. Ryder did hire several drivers in November, 1972.

Nonetheless Sloan is not entitled to any individual relief because the Court concludes that his driving record was such that the Company legitimately refused to rehire him in 1971 and that, therefore, he was not denied a road driving job because of his race. All of Sloan's claims for individual relief are denied.

62. Booker T. Alexander and J. P. Campbell. Plaintiff Alexander and class member Campbell are currently garagemen in Ryder's Shop. Their testimony concerned racial discrimination within the Shop and is not directly related to the testimony of other plaintiffs and class members regarding discrimination in over-the-road driving jobs.

Campbell and Alexander demonstrated that around 1967 or 1968 the Company unilaterally changed the job duties of mechanics (who were all and still are all white) to allow them to grease tractor trailers and change the oil in tractor trailers. These tasks had normally and consistently been performed by garagemen, and the job descriptions contained in the pertinent collective bargaining agreement indicates that garagemen have been designated to do those duties.

In addition, Campbell and Alexander, like plaintiff Sloan, showed that through discriminatory assignment of work in the Shop black garagemen were consistently required to clean the grease pit and do other dirty jobs while white garagemen were given easier tasks.

Because of the restrictive seniority provisions of the Shop contract in effect prior to 1973, neither Alexander nor Campbell were allowed to move from a garageman's job to a mechanic helper's job or other Shop job without forfeiting their accrued seniority. Alexander testified that he was discouraged from becoming a trailer mechanic because of the requirement that he forfeit all his seniority if he moved from a garageman job to a trailer mechanic job. Campbell was told that if he attempted to become a mechanic helper and did not qualify for the position he would be terminated with the Company.

The testimony of Campbell and Alexander as well as that of a white employee by the name of Frank Ellis demonstrated that racial discrimination was practiced by Ryder's supervisory personnel in the Shop, especially by Robert Attaway. Attaway assigned work in the Shop on a racially discriminatory basis and regularly had white favorites. In addition, Attaway, on at least one occasion, used the word "nigger" in a conversation with Ellis.

Actions in the Shop seemed to favor white mechanics over the garagemen. For example, on one occasion the doors of the Shop leading to the garagemen's work area broke down and were not repaired while doors leading to the mechanics' work area were repaired.

The Court concludes that neither Campbell or Alexander is entitled to monetary relief or to changes in their seniority; however, their claims of racial discrimination within the Shop are supported by the evidence and require appropriate injunctive relief.

63. Rueben Winslow. Class member Winslow first applied at Ryder in September 1969. He was told by someone who identified himself as Ryder Terminal Manager that his application would be put on file. In 1971, Winslow filed a second application and spoke to D. T. Bradfield. Again in 1973, Winslow filed an application with Ryder. Despite his attempts to obtain a job and the fact that Ryder was periodically hiring drivers, Winslow never heard from the Company.

As of 1969, Winslow had driving experience with Checkerboard Feed and other employers; he was qualified to drive for Ryder. The Court finds as a fact that Winslow was denied a job because of his race in 1969 and 1971. He is entitled to equitable back pay from September 30, 1969, to the present and to be hired as a longline driver with a longline seniority date of September 30, 1969.

64. J. D. Grier. Class member Grier applied for an over-the-road job with Ryder in July, 1969. Subsequently, he talked with D. T. Bradfield on several occasions but was never offered a job as an over-the-road driver for the Company.[4]

As of July, 1969, Grier had significant experience working as an over-the-road driver for Thomas and Howard Company and New Dixie Truck Lines, among others. The Court finds as a fact that Grier was qualified to be an over-the-road driver for Ryder in 1969 and that he was not hired because of his race. Grier is entitled to equitable back pay from August 12, 1969 to the present and to be hired as an over-the-road driver with Ryder with a longline seniority date of August 12, 1969.

65. Bobby Taylor. Class member Taylor applied for a road job with Ryder on October 23, 1973. He never heard

[4] The Company's chief witness, D. T. Bradfield, testified that Grier was offered a road job in December, 1969, as a longline truck driver. However, upon cross-examination it became clear that Grier had not been offered a job by the Company but, at best, had been told that he might be offered a job sometime later when his references were finally checked out. The Court finds that no job offer was made. Moreover, in 1969 Ryder was utilizing a significant number of double runs. The Court finds as a fact that the hiring of Grier was inextricably linked in the possible hiring of another black applicant by the name of Moss who also was never hired by the Company.

from the Company, and has never worked for Ryder. The last driver hired by Ryder in 1973 was hired on November 29, 1973, and applied on August 29, 1973. No road drivers have been hired since November 29, 1973.

Although Taylor was qualified to be an over-the-road driver for Ryder in 1973, the Court concludes that he was not discriminated against on account of his race. All of Taylor's claims for relief are denied.

66. Wiley Carpenter. Class member Carpenter applied in June, 1972, for a local driving position for Ryder but was never hired. The evidence shows no recent discrimination by Ryder in the hiring of local drivers. The Court concludes that Carpenter has failed to demonstrate that he was not hired because of his race. All of his claims for relief are denied.

67. The above numbered paragraphs constitute the Court's findings of fact made pursuant to Rule 52, Federal Rules of Civil Procedure. Where said findings also constitute conclusions of law they should be so treated.

Conclusions of Law

Based on the foregoing Findings of Fact, the Court enters the following Conclusions of Law:

1. This Court has jurisdiction over this action under the provisions of Section 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f), 42 U.S.C. § 1981 and 28 U.S.C. § 1343(4).

2. Defendant Ryder Truck Lines, Inc. is an employer within the meaning of 42 U.S.C. § 2000e-(b).

3. Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local 71 thereof are labor organizations within the meaning of 42 U.S.C. § 2000e-(d).

4. Plaintiffs herein have complied with the procedural requirements of Section 706(a), 706(d) and 706(e) of Title VII of the Civil Rights Act of 1964. This action is also properly brought pursuant to 42 U.S.C. § 1981 and 28 U.S.C. § 1343.

5. The policy, pattern and practice of the defendant Ryder Truck Lines, Inc. of excluding black persons, including certain named plaintiffs as well as members of the class which the plaintiffs represent, from certain jobs with the defendant Company including, but not limited to, longline truck driver positions, journeyman mechanic and trailer mechanic positions, and supervisory jobs constitutes an unlawful employment practice in violation of Title VII and 42 U.S.C. § 1981. *Hairston* v. *McLean Trucking Co.* [6 EPD ¶ 8841 and 7 EPD ¶ 9144] 62 F.R.D. 642 (M.D.N.C. 1974), *remanded for additional relief* [10 EPD ¶ 10,353] 520 F.2d 226, 11 FEP Cases 91 (4th Cir. 1975); *Rodriguez* v. *East Texas Motor Freight, supra.*

6. The refusal of the defendant Company and the defendant unions to take affirmative action to remedy the present and continuing effects of past and continuing discrimination constitutes a violation by the Company and the unions of Title VII and 42 U.S.C. § 1981.

7. The pertinent collective bargaining agreements in effect at the time the Complaint was filed in this action

and more specifically the restrictive seniority provisions of said agreements limiting seniority carryover from one bargaining agreement to another perpetuated into the present the effects of past discrimination and were in violation of Title VII and 42 U.S.C. § 1981. *Hairston* v. *McLean Trucking Co., supra; Barnett* v. *W. T. Grant Co.*, [9 EPD ¶ 10,199] 518 F.2d 593, 10 FEP Cases 1057 (4th Cir. 1975); *Sabala* v. *Western Gillette, Inc.*, [10 EPD ¶ 10,360] 516 F.2d 1251 (5th Cir. 1975); *Rodriguez* v. *East Texas Motor Freight, supra.*

8. The pattern and practice engaged in by the defendant Company in fostering racially discriminatory work assignments in the Maintenance department and in allowing the harassment of blacks is a violation of Title VII and 42 U.S.C. § 1981. *Commonwealth of Pa.* v. *Local Union No. 542, International Union of Op. Engineers,* [5 EPD ¶ 8004] 347 F. Supp. 268 (E.D. Pa. 1972).

9. Plaintiffs Robert L. Johnson, Jr., Ernest McManus, William G. Coffey, Jr., and Willie Jackson and class members Clyde Long, Vincent Gray, Sammie Simms, Tommie Freeman, Isaiah Massey, James Cowen, Rueben Winslow, and J. D. Grier have each suffered harm as a result of the discriminatory practices of the defendants. These individual discriminatees have suffered monetary loss and, in some cases, loss of valuable seniority as a result of the discriminatory practices of the defendants. Each individual the Court has found to be a victim of discrimination is entitled to those equitable remedies necessary to restore to him all benefits he would have had but for the racial discrimination practiced by the defendants. Each individ-

ual is entitled to monetary damages in the nature of equitable back pay and job placement and seniority adjustment as required by the facts of each individual case. *Albemarle Paper Co.* v. *Moody,* [9 EPD ¶ 10,230] — U.S. —, 43 U.S.L.W. 4880 (1975); *Hairston* v. *McLean Trucking Co., supra; Pettway* v. *American Cast Iron Pipe Co.,* [7 EPD ¶ 9291] 494 F.2d 211 (5th Cir. 1974). Said individuals are also entitled to equitable monetary relief for any future loss of earnings resulting from the discriminatory conduct of the defendants. *United States* v. *United States Steel Corp.*, [6 EPD ¶ 9042] 371 F. Supp. 1045, 1060, 1063 (N.D. Ala. 1973); *Bush* v. *Lone Star Steel Co.,* [7 EPD ¶ 9179] 373 F. Supp. 526, 538 (E.D. Tex. 1974). In its discretion the Court concludes the defendant Company should bear the burden of making necessary back pay payments. Plaintiff Booker T. Alexander and class member J. P. Campbell have also suffered from the discriminatory actions of the defendants; however, they are entitled to no individual monetary relief.

10. The plaintiffs, having prevailed in this matter, are entitled to their costs including reasonable counsel fees, court costs and expenses. *Lea* v. *Cone Mills Corp.,* [3 EPD ¶ 8102] 438 F.2d 86 (4th Cir., 1971); *Robinson* v. *Lorillard Corp., supra* at 804. The Court, in its discretion, taxes all costs, fees, and expenses against the defendant Company.

11. This Court is required, under applicable law, to enter injunctive relief which completely and effectively remedies the pervasive discrimination evident on this record. See generally, *Griggs* v. *Duke Power Co., supra; Hairston* v.

McLean Trucking Co., supra.[5] A judgment will be entered hereafter to meet this duty.

[5] The record indicates that the defendant Company has entered into a Partial Consent Decree in the case of *United States* v. *Trucking Employers, Inc.*, Civil Action No. 74-453 (D.D.C. 1974) (the "TEI" case) since the initiation of this action. That decree imposes on the Company certain affirmative duties throughout their operations. This Court will not require any relief which conflicts with that ordered in *TEI;* however, a judgment will be entered the purpose of which will be to erase all discriminatory practices and, to the extent possible under the applicable statutes, to remedy completely the effects of those practices.

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78 - 179

ROBERT L. JOHNSON, JR., ET AL.,
Petitioners

versus

RYDER TRUCK LINES, INC., ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT RYDER TRUCK LINES, INC., IN OPPOSITION

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OCTOBER TERM, 1978

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT
RYDER TRUCK LINES, INC.
IN OPPOSITION

COMES NOW the Respondent, Ryder Truck Lines, Inc., by and through its undersigned attorneys, and respectfully prays that the Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit filed in this proceeding on July 31, 1978, be denied.

JURISDICTION

Respondent Ryder does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Respondent Ryder contends that the questions presented in this case are more appropriately stated as follows:

1. Does a facially neutral seniority system which has been found to perpetuate the effects of past discrimination violate 42 U.S.C. § 1981 when the seniority system is bona fide under Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h)?

2. Does 42 U.S.C. § 1988 mandate that 42 U.S.C. § 1981 be interpreted consistent with the substantive provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and particularly Section 703(h) of that Act?

3. Did Congress by the enactment of Section 703(h) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-(h), partially and impliedly repeal 42 U.S.C. §1981?

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set forth in the Petition, 42 U.S.C. § 1988 provides in pertinent part:

> "The jurisdiction in civil...matters conferred on the district courts by the provisions of this chapter...shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect...."

STATEMENT OF THE CASE

Petitioner's Statement of the Case is substantially correct. However, the Petition misstates the precise reasons supporting the decision reached by the Fourth Circuit panel on rehearing.

The two members of the Court of Appeals who formed the majority opinion did not conclude that the seniority system in this case would have violated 42 U.S.C. § 1981 prior to the decision by this Court in *Teamsters v. United States*, 431 U.S. 324 (1977). Nor did the panel conclude that Section 703(h) of Title VII, as construed by *Teamsters*, is directly applicable to § 1981. What the panel majority did decide is that *Teamsters* invalidated the earlier conclusion that Ryder's facially neutral seniority system violated Title VII since the seniority system involved in this case was "virtually identical" to that considered in *Teamsters*. App. 2a-3a. Completely independent of this conclusion, however, the panel majority also concluded that the neutral senority system, which applied alike to "both white and black employees", did not violate § 1981.[1] The panel majority went on to conclude that a contrary holding would "disregard the precepts of § 1988" which directs the federal courts to enforce § 1981 "in conformity with the laws of the United States." App. 5a. In a special concurring opinion, the third member of the court's panel agreed with the majority's conclusions in all respects, with the exception of that concerning § 1988, which he felt had "nothing to do with this case." App. 10a.

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1. All three members of the panel agreed that the only cause of action under § 1981 of the pre-1965 incumbent black employees was when they were initially hired, but that this cause of action was barred by North Carolina's three year statute of limitations, N.C. Gen. Stat. § 1-52(1).

ARGUMENT

Setting the legal intricacies aside, this case boils down to whether this Court is willing to render meaningless and completely undermine its recent landmark decision in *Teamsters v. United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977) by opening to attack under 42 U.S.C. §1981 seniority systems which are both facially neutral and "bona fide" within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(h), even though the seniority systems may perpetuate the effects of past discrimination. The Petition presents three basic arguments why it should be granted: (1) the Fourth Circuit's decision below is inconsistent with this Court's decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 10 FEP Cases 817 (1975); (2) there is a split among the circuits over the application of 42 U.S.C. §1981 to facially neutral seniority systems that perpetuate past discrimination; and (3) this Court has already granted certiorari in *County of Los Angeles v. Davis*, No. 77-1553, which presents an issue similar to that in the instant case.

Perhaps the Petitioners' weakest argument is the contention that the Fourth Circuit's Decision below is inconsistent with this Court's Decision in *Johnson v. Railway Express Agency, Inc., supra*, where, in the midst of holding that the timely filing of a charge with the EEOC under Title VII does not toll the running of the applicable statute of limitations in § 1981 claims, this Court also found that the "remedies available" under the two statutes "although related, and although directed to most of the same ends, are separate, distinct and independent." 421 U.S. at 461, 10 FEP Cases at 820. Respondent Ryder does not dispute this basic proposition. However, as has been recognized by a number of courts, the obvious flaw in the Petitioners' theory is that it would result in a clearly undesirable conflict in an extremely important area of *substantive* federal law. It is for this very reason that the great weight of authority (and the better-reasoned approach), both before and after *Johnson* and *Teamsters*, has recognized that the two avenues of relief, although separate and independent, are nonetheless parallel and overlapping, and should be interpreted in such a manner as to avoid inconsistent results in their substantive provisions. See *Davis v. County of Los Angeles*, 566 F.2d 1334, 16 FEP Cases 396, 400-01 (9th Cir. 1977), *cert. granted*, No. 77-1553 (1978); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270, 12 FEP Cases 314, 323 (4th Cir.), *cert. denied*, 429 U.S. 920, 13 FEP Cases 1808 (1976); *Chance v. Board of Examiners*, 534 F.2d 993, 11 FEP Cases 1450 (2d Cir.), *modified on rehearing on other grounds*, 534 F.2d 1007, 13 FEP Cases 150 (2d Cir. 1976), *cert. denied*, 431 U.S. 965, 14 FEP Cases 1822 (1977); and *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 8 FEP Cases 577 (7th Cir. 1974), *cert. denied*, 425 U.S. 997, 12 FEP Cases 1335 (1976). The court below quite correctly pointed out that *Johnson* gives "no indication . . .that Congress intended to create conflicting and contradictory standards for determining what constitutes illegal discrimination." App. 6a-7a. Indeed, this Court recognized the "parallel" and "overlapping" relationship between Title VII and §1981 in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, n. 7, 7 FEP Cases 81, 85 (1973). Any other conclusion than that reached below would not only render meaningless Section 703(h) of Title VII, but would also completely undermine this Court's Decision in *Teamsters*.

Although Ryder agrees that the position among the circuits concerning the application of § 1981 is not uniform, the Petition considerably overstates the alleged conflict among the circuits on this issue. Initially, it should be pointed out that no circuit, including the Second Circuit, has squarely held that the enactment of Section 703(h) constituted a partial "repeal by implication" of § 1981. Indeed, those circuits which have squarely ruled upon this question, including the Fourth Circuit below, have unanimously held that Section 703(h) did not impliedly repeal § 1981. App. 3a, 9a, n.2; see *Bolden v. Pennsylvania State Police*, ___F.2d___, 17 FEP Cases 687 (3d Cir. 1978); and *Long v. Ford Motor Co.*, 496 F.2d 500, 7 FEP Cases 1053 (6th Cir. 1974). A rejection of the implied appeal theory is, in essence, all the Third Circuit was saying when, in *Bolden v. Pennsylvania State Police, supra*, it commented in general fashion that Congress, by enacting Title VII, did not intend to "circumscribe the remedial powers of the federal courts under §§ 1981, 1983, 1985 and 1988." —— F.2d at ——, 17 FEP Cases at 693. Neither has the Second Circuit expressly adopted the implied repeal theory. In *Chance v. Board of Examiners, supra*, the court concluded that a neutral seniority system which "passed scrutiny under the substantive requirements of Title VII", also was not violative of § 1981 (citing the Sixth Circuit's decision in *Waters v. Wisconsin Steel Works, supra*). 534 F.2d at 998, 11 FEP Cases at 1454. The court stated that its conclusion was the same whether Section 703(h) of Title VII was "considered a repeal by implication of any possible contrary construction in § 1981, or *simply a statement of guiding legal principles. . .*" *id.* (Emphasis added).

No circuit has interpreted § 1981 in the manner advocated

by the Petitioners here. Specifically, the Second, Fourth Seventh and Ninth Circuits, in the cases cited above, all have specifically interpreted § 1981 so as to avoid undesirable conflicts in the substantive provisions of Title VII. The Third, Fifth,[2] Eighth and Tenth and D.C. Circuits have not ruled on the specific issue presented here, and the Sixth Circuit has not faced the issue since *Teamsters*. The Sixth Circuit's decision in *Afro-American Patrolmen's League v. Duck*, 503 F.2d 294, 8 FEP Cases 1124 (6th Cir. 1974), and the Fourth Circuit's decision in *Williams v. Norfolk and Western Ry.*, 530 F.2d 539, 11 FEP Cases 836 (4th Cir. 1975) do not support the Petitioners' position. Both of these decisions were handed down before *Teamsters*, and both applied § 1981 in a manner which was consistent with the way most courts had interpreted Title VII up to that time.

Respondent Ryder agrees that the issue in this case bears a close relationship to that which this Court will decide in *County of Los Angeles v. Davis*, No. 77-1553. However, it is also entirely possible that the decision in *County of Los Angeles* would dispose of this case. Whether this Court af-

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2. In *Watkins v. United Steel Workers, Local 2369*, 516 F.2d 41, 10 FEP Cases 1297 (5th Cir. 1975), the Fifth Circuit upheld a facially neutral seniority system under both Title VII and § 1981. In reaching its decision, the court expressly refrained from ruling on whether Section 703(h) impliedly repealed § 1981. As the Petition pointed out, p. 9,n. 12, the court was no doubt influenced at least in part by the finding that the seniority system in question did not perpetuate the effects of past discrimination. It is significant to note, however, that in reaching its decision, the court interpreted Title VII and § 1981 in parallel and consistent fashion. Moreover, the court gave an indication that it, like the Second, Fourth, Seventh and Ninth Circuits, would interpret § 1981 so as to avoid substantive conflicts with Title VII, when it decided in *United States v. East Texas Motor Freight*, 564 F.2d 179, 16 FEP Cases 163 (5th Cir. 1977) that a seniority system "bona fide" under Title VII was not unlawful under Executive Order 11246.

firms the Ninth Circuit's decision (and its holding that there is "no operational distinction. . .between liability based upon Title VII and § 1981", 566 F.2d at 1340, 16 FEP Cases at 401), or reverses its decision and accepts the view that §1981 requires a showing of discriminatory intent,[3] in either case there would be no basis for reversing the Fourth Circuit's well-reasoned opinion below.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully reuested that the Petition For A Writ Of Certiorari To The United States Court of Appeals For the Fourth Circuit be denied.

Respectfully submitted,

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3. See *Washington v. Davis*, 426 U.S. 229, 12 FEP Cases 1415 (1976); *Davis v. County of Los Angeles, supra*, (Dissent of Judge Wallace); *Johnson v. Hoffman*, 424 F.Supp. 490, 16 FEP Cases 371 (E.D. Mo. 1977); and *Croker v. Boeing Co.*, 437 F.Supp. 1138, 15 FEP Cases 165 (E.D. Pa. 1977).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Brief For Respondent Ryder Truck Lines, Inc., In Opposition has been served this 24th day of August, 1978, by United States first class mail, upon the following:

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IN THE

Supreme Court of the United States

OCTOBER, 1978

No. 78-179

ROBERT L. JOHNSON, JR., *et al.*,
Petitioners,

v.

RYDER TRUCK LINES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT UNIONS IN OPPOSITION

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BRIEF FOR RESPONDENT UNIONS IN OPPOSITION

OPINIONS BELOW

The findings, conclusions and opinion of the District Court are unofficially reported at 10 [CCH] EPD ¶ 10,535; they are reprinted in the Appendix to the Petition, at pp. 26a-71a. The District Court's judgment is unofficially reported at 11 [CCH] EPD ¶ 10,692; it is reprinted at pp. 15a-25a of the Petition's Appendix. The April 1, 1977 opinion of the Court of Appeals (Pet., at 13a-14a) is reported at 555 F.2d 1181, while its May 2, 1978 opinion on rehearing (Pet., at 1a-12a) is reported at 575 F.2d 471.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The Respondent Unions restate the question presented by this case in the following terms:

Does a bona fide seniority system, applying equally to all races and ethnic groups, violate Section 1981 of Title 42, United States Code, because it does not afford retroactive seniority credits to victims of past discrimination in hiring?

STATUTORY PROVISIONS INVOLVED

Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-2(h), and 42 U.S.C. § 1981, are set forth in the Petition, at 3. In addition, 42 U.S.C. § 1988 provides in pertinent part:

> "The jurisdiction in civil . . . matters, conferred on the district courts by the provisions of this chapter . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect . . ."

STATEMENT

This action under Title VII and 42 U.S.C. § 1981 was filed on January 5, 1973 by the Petitioners against their employer, Ryder Truck Lines, Teamsters Local 71 and the International Brotherhood of Teamsters. The complaint alleged a variety of discriminatory actions, including hiring discrimination by Ryder, and the maintenance of a seniority system prior to July, 1973, which had the effect of perpetuating discriminatory hiring policies. The case was certified as a class action; it was tried in August,

1975. On November 18, 1975, the United States District Court for the Western District of North Carolina found and concluded, *inter alia*, that Ryder had pursued a policy of refusing to hire over-the-road drivers from the ranks of black applicants for employment and black employees working in local cartage operations. Also, the seniority system in force when the suit was filed was held discriminatory.

The District Court's findings indicated that the seniority provisions of the City Cartage and Over-the-Road Supplements to the National Master Freight Agreement, which were effective prior to July 1, 1973, had the effect of perpetuating Ryder's discriminatory hiring policies so far as they did not permit transferees from city cartage to carry their terminal seniority with them upon moving to road jobs. (Pet., at 35a, 37a) "[T]he restrictive seniority provisions in the pertinent agreements were [held] violative of Title VII and 42 U.S.C. § 1981." (Pet., at 36a) The District Court further noted that, effective July 1, 1973, the seniority system was changed to permit transferees between city and road jobs to carry with them their full terminal seniority. (Pet., at 37a-38a) The plaintiffs and class members who transferred to road jobs enjoyed the benefit of these contract changes. Their seniority status was not affected by the Fourth Circuit Court of Appeals' decision on the question presented by the Petition.

The District Court awarded backpay to five employees it found to have been discriminatorily excluded from road jobs by Ryder at hire, and inhibited from transferring by their inability to carry over accrued terminal seniority under the pre-1973 collective bargaining agreements. On April 1, 1977, the Court of Appeals affirmed per curiam the District Court's judgment. (Pet., at 13a) Ryder's petition for rehearing was first denied and then granted

after this Court's decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) (hereinafter *T.I.M.E.-D.C.*). On rehearing, the Court of Appeals remanded for further consideration of the five employees' claims. (Pet., at 7a)

The Fourth Circuit panel unanimously concluded that *T.I.M.E.-D.C.* required reversal of that portion of the District Court's decision holding that the pre-1973 seniority system violated Title VII because it perpetuated past discrimination. In addition, it held that a facially neutral seniority system, "bona fide" within the meaning of Section 703(h), did not violate 42 U.S.C. § 1981. Under the pre-1973 contracts, white as well as black employees were required to yield their accrued seniority when transferring to road jobs. "Consequently, § 1981 does not afford the black employees relief, because the statute confers on black persons only the same rights possessed by white persons." (Pet., at 4a) Two members of the Court concluded that 42 U.S.C. § 1988, which "instructs federal courts as to what law to apply in causes of action arising under federal civil rights acts,'" required that the protections for bona fide seniority systems contained in Section 703(h) be taken into account in applying Section 1981 to claims alleging seniority discrimination. Circuit Judge Winter concurred in the holding that Section 1981 does not outlaw bona fide seniority systems.

ARGUMENT

I.

THE DECISION BELOW IS CORRECT AND CONFORMS TO THIS COURT'S PRECEDENTS

This case presents the same issue under 42 U.S.C. § 1981 which this Court decided under Title VII in *T.I.M.E.-D.C.* There, as here, it was contended that a

facially neutral seniority system, applying equally to all races and ethnic groups, perpetuated past hiring discrimination because it did not permit seniority to be transferred across departmental lines. Like the all but identical seniority provisions considered in *T.I.M.E.-D.C.*, the vice of the pre-1973 seniority system involved in this case was said to be its tendency to "lock" minorities into city cartage jobs. But "to the extent that it 'locks' employees into non-line driver jobs, it does for all. . . ." 431 U.S. at 355-56.

The record is barren of any suggestion that the pre-1973 contracts were negotiated or maintained for any illegal purpose. Thus the sole question is whether their failure to extend retroactive seniority to victims of past discrimination amounts to a violation of Section 1981.

Based on the equal application of the pre-1973 contracts to both black and white city cartage drivers, the Court of Appeals concluded that "§ 1981 does not afford the black employees relief, because this statute confers on black persons only the same rights possessed by white persons." (Pet., at 4a) The Court acknowledged that each black incumbent employed prior to 1965 had a cause of action under Section 1981 for the hiring discrimination perpetrated against him. It noted, however, that these hiring claims were barred by North Carolina's three-year statute of limitations applicable to such claims. (Pet., at 4a, 8a); *Johnson* v. *REA*, 421 U.S. 454, 462 (1974). This holding is undoubtedly correct. As this Court stated in *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 758 (1976), "the underlying legal wrong . . . is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. . . ." Here the hiring discrimination against the five employees affected by the Court of Appeals' decision on reconsideration occurred between 1950 and 1957, when two were hired by Ryder (2 JA 217-18, 239) and three were hired by another firm

later acquired by Ryder (2 JA 183, 262, 319). These ancient acts were "unfortunate event[s] in history which . . . [have] no present legal consequences." *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977).

Evans involved a Title VII claim, in which a seniority system was alleged to have continued the effects of a discriminatory no-marriage rule, thereby preserving the discriminatee's otherwise time-barred claim. This "continuing violation" theory was rejected. Although *Evans* is not dispositive of this case, 431 U.S. at 558 n.10, it is significant to the extent this Court recognized that time-barred events frequently affect the calculation of seniority. *Id.* at 560. This is equally true in Section 1981 cases. See *Griffin* v. *Pacific Maritime Ass'n.*, 478 F.2d 1118, 1119-20 (9th Cir.), cert. denied, 414 U.S. 859 (1973); *Chatman* v. *United States Steel Corp.*, 425 F. Supp. 753, 761 (N.D. Calif. 1977). Statutes of limitation reflect an interest in prohibiting the prosecution of stale claims, an interest to be given effect in cases arising under Section 1981. *Johnson* v. *REA*, *supra*, 421 U.S. 454; 42 U.S.C. § 1988. This interest is defeated by regarding acts of hiring discrimination as continuing indefinitely, so long as they affect calculations of seniority credit under a neutral seniority system. That the Fourth Circuit declined to view the individual hiring claims involved here as continuing over approximately two decades surely suggests no conflict with this Court's decision in *Johnson*.

It is not apparent why hiring claims asserted by discriminatees employed in less desirable classifications allegedly continue by operation of a neutral seniority system, while claims of persons initially rejected for any job but hired later with less seniority than they might have had but for the discrimination, do not continue. Not only is the present seniority effect given to past acts of hiring discrimination the same, but, "if anything, the

latter group is more disadvantaged. . . ." *T.I.M.E.-D.C.* v. *United States*, *supra*, 431 U.S. at 355. The same observation can be made with respect to employees discriminatorily discharged or laid off and later rehired. E.g., *United Air Lines, Inc.* v. *Evans*, *supra*, 431 U.S. 533; *Griffin* v. *Pacific Maritime Ass'n.*, *supra*, 478 F.2d 1118. Certainly the distinction between claims does not lie in the nature of a departmental seniority system, for there is nothing inherently discriminatory about a departmental seniority system. *T.I.M.E.-D.C.* v. *United States*, *supra*, 431 U.S. 324. Nor is there any distinction in terms of limitations policy. The accrual of a hiring claim is at least as evident to an employee as a rejected applicant, and the one has slept on his Section 1981 rights no less than the other. *Johnson* v. *REA*, *supra*, 421 U.S. at 466.

Contrary to the Petitioners' assertion (Pet., at 7), the lower Court's decision does not conflict with this Court's conclusion in *Johnson* "that Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of . . . Title VII. . . ." *Id.* Like Congress,[1] this Court considered the two statutes in a procedural and remedial context. *Id.* at 460. Other than to mention that Title VII and Section 1981 are "co-extensive" and that they "augment each other and are not mutually exclusive," 421 U.S. at 459, *Johnson* did not consider substantive prohibitions against particular acts of discrimination. Earlier this Court observed that "legislative enactments

[1] Little more can be gleaned from the legislative history of Title VII's 1972 amendments than "a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 (1974). Congress was concerned that the short statutes of limitations, complex procedural prerequisites and coverage limitations in Title VII required the preservation of multiple remedies. *Johnson* v. *REA*, *supra*, 421 U.S. at 460, 471.

in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47. As the lower Court found, this Court nowhere has suggested that, as between Title VII and Section 1981, "Congress intended to create conflicting and contradictory standards for determining what constitutes illegal discrimination." (Pet., at 6a-7a)

The Petitioners' assertion (Pet., at 10-11) that the decision below is inconsistent with this Court's constitutional decisions in school desegregation, voting and racial convenant cases overlooks fundamental differences between employment and other types of discrimination cases. The school desegregation cases are based on one overriding concept: "Separate educational facilities are inherently unequal. . . ." *Brown* v. *Bd. of Educ.,* 347 U.S. 483, 495 (1954). "The burden on a school board today is to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed." *Green* v. *County School Bd.,* 391 U.S. 430, 439 (1968).

"Freedom-of-choice" and other desegregation plans disapproved by this Court were not themselves held violative of the fourteenth amendment as perpetuating past discrimination. *Id.* at 439. Instead, they were found insufficient to accomplish desegregation *now. Id.* at 40. In short, the school desegregation cases are concerned with the adequacy of remedial measures formulated by school boards to comply with their affirmative duty under the fourteenth amendment " 'to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' " *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15 (1971).

These principles cannot be incorporated wholesale into the private employment sector. Neither Title VII nor

Section 1981 impose an affirmative duty on employers and labor organizations to construct a "unitary" employment system.[2] *T.I.M.E.-D.C.* v. *United States, supra,* 431 U.S. at 353. Unlike the school desegregation cases, which are concerned with remedies alone, this case turns on whether a racially neutral seniority system is itself discriminatory because it does not extend retroactive seniority credits to victims of past hiring discrimination. Here the hiring violations are time-barred and have no present legal significance, unless the failure to remedy them can be said to constitute a present violation. This Court has never intimated that the nondiscrimination obligation mandates affirmative action of this sort. School and employment discrimination cases cannot be equated.[3]

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[2] The duty of a union certified as an exclusive bargaining agent to represent unit employees fairly is "at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. . . ." *Steele* v. *Louisville & N.R.R.,* 323 U.S. 192, 202 (1944); see also *Syres* v. *Oil Workers, Local 23,* 350 U.S. 892 (1955). Yet this fair representation duty is not violated by maintenance of a neutral seniority system, even though that system may perpetuate the effects of past discrimination in hiring. *Whitfield* v. *United Steelworkers,* 263 F.2d 546 (5th Cir. 1958), cert. denied, 360 U.S. 902 (1959). The fact that the fair representation doctrine rests on equal protection underpinnings weighs heavily against the Petitioners' assertion that the lower Court's decision conflicts with half a century of constitutional decisions because the substantive prohibitions of Section 1981 are at least as broad as the fourteenth amendment. (Pet., at 10-11)

[3] *Lane* v. *Wilson,* 307 U.S. 268 (1939), in which a state first refused to permit blacks to register to vote and then, in effect, closed out the voting lists to all prospective registrants, is even wider of the mark. The state's conduct there more nearly can be analogized to a seniority system which is negotiated and maintained for express discriminatory purposes. See *T.I.M.E.-D.C.* v. *United States, supra,* 431 U.S. at 356.

II.

THERE IS NO CONFLICT OF DECISION

Minor differences of principle are apparent in the decisions of the several Courts of Appeal that have applied Section 1981 to employment discrimination cases. But these differences cannot fairly be described as conflicts of decision. At the outset, it should be noted that this Court has vacated and remanded cases brought under Section 1981 for reconsideration in light of *T.I.M.E.-D.C.*[4] In view of this Court's action, it is highly questionable whether Section 1981 cases decided before *T.I.M.E.-D.C.*[5] by Circuit Courts that have not yet reconsidered the issue necessarily represent the state of the law within these Circuits. Cf. *United States* v. *East Texas Motor Freight System, Inc.*, 564 F.2d 179, 185 (5th Cir. 1977). The correctness of this view is indicated by the Sixth Circuit's experience. *Afro American Patrolmens League* v. *Duck*, *supra*, 503 F.2d 294 and *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974), cited in the Petition, at 9, were followed by *Alexander* v. *Aero Lodge No. 735, IAM*, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 56 L.Ed.2d 787 (1978). Although the *Alexander* case was brought under both Title VII and Section 1981, the Sixth Circuit Court of Appeals reversed on the "seniority perpetuation" issue in light of *T.I.M.E.-D.C.*[6]

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[4] *Western Gillette, Inc.* v. *Sabala*, 431 U.S. 951 (1977); *Detroit Edison Co.* v. *EEOC, et al.*, 431 U.S. 951 (1977).

[5] E.g., *Afro American Patrolmens League* v. *Duck*, 503 F.2d 294 (6th Cir. 1974); *Macklin* v. *Spector Freight Systems*, 478 F.2d 979 (D.C. Cir. 1973).

[6] There was no discussion of whether the bona fide seniority system in *Alexander* violated Section 1981. But the Sixth Circuit directed the District Court to "consider whether, absent consideration of the effects of the seniority system," the proof had established a " 'regular procedure or policy' " of discrimination. 565 F.2d at 1383.

No Circuit has held that Title VII, § 703(h) impliedly repealed Section 1981. In *Chance* v. *Board of Examiners*, 534 F.2d 993, modified on other grounds, 534 F.2d 1007 (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977), the Second Circuit Court of Appeals declined to condemn as violative of Section 1981 a seniority system that withstood scrutiny under Title VII. The alternative grounds for its holding were that Title VII, § 703(h) either impliedly repealed "any possible contrary construction of § 1981," or furnished "a statement of guiding legal principles. . . ." *Id.* at 998. The latter ground enjoys wide acceptance among the lower Courts, which properly have interpreted Section 1981 to avoid substantive conflicts with Title VII. *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir.), cert. denied, 429 U.S. 920 (1976); *Waters* v. *Wisconsin Steel Works*, *supra*, 502 F.2d at 1320 n.4; accord, *Watkins* v. *United Steelworkers, Local 2369*, 516 F.2d 41 (5th Cir. 1975).[7]

Thus the several Courts of Appeal have followed closely parallel avenues in reaching the same result, that is, Section 1981 does not outlaw bona fide seniority systems. But this fact falls far short of establishing a conflict in decision warranting exercise of this Court's certiorari authority.

The Court also stated its agreement with the holding of *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976).

[7] In *Watkins*, while suggesting that the substantive standards under Title VII and Section 1981 were the same as to employment issues dealt with by both statutes, the Fifth Circuit Court of Appeals rejected a challenge to a bona fide seniority system under Section 1981 because the proof did not establish acts of hiring discrimination against specific individuals allegedly perpetuated by the seniority system. See also *United States* v. *East Texas Motor Freight System, Inc.*, *supra*, 564 F.2d at 185, where the Court of Appeals intimated that the principles of *T.I.M.E.-D.C.* also applied to Section 1981 claims.

The Third Circuit Court of Appeals' decision in *Bolden* v. *Pennsylvania State Police*, 17 FEP Cases 687 (8th Cir. 1978), does not detract from our conclusion. There an intervenor attempted to obtain, *pendente lite*, modification of a consent decree's remedial provisions, to which it had agreed, on the ground of precedential evolution. Noting that the intervenor shouldered a particularly heavy burden, the Third Circuit denied relief. Due to the procedural context of the case, the issue was cast in terms of remedy and not violation: Whether *T.I.M.E.-D.C.* and its progeny "have made the elimination of seniority as a criterion for promotion illegal." *Id.* at 693. The Court indicated that it could not impute to Congress an "intention to circumscribe the remedial authority of the federal courts under §§ 1981, 1983, 1985 and 1988." *Id.* It also emphasized the "distinction, when relief is sought under Title VII, between violations of § 703(h) and remedies under § 706(g)." *Id.* Clearly *Bolden* did not reach the issue in the instant case.

III.

COUNTY OF LOS ANGELES v. *DAVIS*, NO. 77-1553, PRESENTS A DIFFERENT LEGAL QUESTION

In *County of Los Angeles* v. *Davis*, 566 F.2d 1334 (9th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3780 (U.S., June 19, 1978) (No. 77-1553), the Ninth Circuit Court of Appeals held that use of an employment test violated Section 1981 based on a showing that the test screened out disproportionate numbers of minority persons, thus establishing a prima facie case of discrimination which was not rebutted due to the employer's failure to demonstrate the test's validity. A divided panel held that no proof of an actual intent to discriminate was required under Section 1981 as it is in equal protection cases. *Washington* v. *Davis*, 426 U.S. 229 (1976). In the

panel's view, Title VII's impact discrimination standard, as outlined in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), is applicable to Section 1981 claims.

"Impact discrimination" is significantly different than the "past discrimination perpetuated" theory on which the instant case was tried and appealed. Disproportionate impact and job relatedness are critical issues in "impact discrimination" cases, *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), while "past discrimination perpetuated" theories turn on a failure to extend a remedy for earlier acts of discrimination. See *T.I.M.E.-D.C.* v. *United States*, *supra*, 431 U.S. at 348. These differences are underscored by the fact that *County of Los Angeles* does not involve the statute of limitations or seniority issues presented by the question in this case. Whether a violation of Section 1981 can be made out without proof of an actual intent to discriminate is simply not a question here.

Even if we are wrong in this regard, it is clear that this Court's decision in *County of Los Angeles* will not affect the result reached by the Court below. A holding that intentional discrimination is a critical element of a Section 1981 claim will privilege bona fide seniority systems, since they are by definition negotiated and maintained without regard to race. If, on the other hand, this Court agrees with the Ninth Circuit's holding that there is no operational distinction in liability standards between Title VII and Section 1981, bona fide seniority systems will be no more subject to attack under Section 1981 than Title VII.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Fourth Circuit Court of Appeals should be denied.

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IN THE

Supreme Court of the United States

OCTOBER, 1978

No. 78-179

ROBERT L. JOHNSON, JR., *et al.*,

Petitioners,

v.

RYDER TRUCK LINES, INC., *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Subsequent to the filing of the petition in this case, a decision of the Fifth Circuit was published[1] which expressly recognized the conflict among the circuits regarding the application of section 1981 to seniority systems. *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978). The court of appeals there noted:

> Appellants maintain that Teamsters does not affect our prior holding to the extent that it was grounded in 42 U.S.C. § 1981. Two of our sister circuits have recently split on this issue, the Fourth Circuit holding that bona fide senority systems which are protected by section 703 (h) of Title VII are not violative of section 1981, and the Third Circuit reaching a contrary conclusion that section 703 (h) does not affect the remedial

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[1] The opinion is dated July 24, 1978, and appears in the Federal Reporter, 2d advance sheet dated August 7, 1978. The petition in this case was filed on August 2, 1978.

> powers of the federal courts under section 1981. *Johnson* v. *Ryder Truck Lines, Inc.* . . . ; *Bolden* v. *Pennsylvania State Police* . . . . 576 F.2d at 1191, n. 37.

Since the Fifth Circuit had earlier held that section 1981 forbad the use of seniority systems that perpetuate past discrimination,[2] the issue in *Pettway* was whether Congress in enacting Title VII intended to repeal section 1981 insofar as section 1981 provided a greater remedy than Title VII itself. The Fifth Circuit concluded that such a repeal had been intended:

> Assuming, as we must, that Congress intended section 703 (h) to accord absolute protection to pre-Act seniority rights which accrued under bona fide seniority systems, Congress could not have intended such seniority rights to remain subject to revision under section 1981. 576 F2d at 1192, n.37.

This view that Title VII establishes the exclusive standard in employment discrimination cases is similar to that of the majority opinion in the instant case, but is entirely inconsistent with *Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975).

Respondents suggest that any possible resolution of *County of Los Angeles* v. *Davis,* No. 77-1553, will be favorable to them, urging that the Court must either hold that section 1981 requires proof of discriminatory intent or that there is "no operational distinction" between the liability standards under section 1981 and Title VII.[3] If *County of Los Angeles* holds that section 1981 requires proof of intent, that would not dispose of the instant case, for intentional discrimination in hiring and assignment was found by both the district court and the court of appeals. Notwithstanding *Washington* v. *Davis,* 426 U.S. 229 (1976), even in a constitutional case such initial intentional discrimination is sufficient to render unlawful neutrally motivated practices which perpetuate the effect of past discrimination. A possible alternative disposition of *County of Los Angeles,* indeed the position pressed by the petitioner in that action,[4] would be a holding that the substantive prohibitions of Title VII do not affect the proper construction of section 1981; such a holding would require reversal of the decision of the Fourth Circuit in the instant case.

For the above reasons a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

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[2] Petition, p. 9.

[3] Brief for respondent Ryder Truck Lines, pp. 7-8; Brief for Respondent Unions, pp. 12-13.

[4] Brief for Petitioner, No. 77-1553, pp. 14-18, 39-46.